

Vol IV

TABLE OF RECORD

1910-1911 to 1912

Supreme Court of the United States

RECORDED HERE, 1912

No. 185

UNITED CONSTRUCTION WORKERS, AFFILIATED
WITH UNITED MINE WORKERS OF AMERICA,
ET AL, PETITIONERS,

LABURNUM CONSTRUCTION CORPORATION

ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF APPEALS OF
THE COMMONWEALTH OF VERMONT

RECORDED FOR THE COMMONWEALTH FILED JULY 12, 1912

RECORDED FOR THE COMMONWEALTH JANUARY 12, 1913

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Vol. IV

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City Hall,
Richmond, Virginia
Tuesday, February 13, 1951

Met in chambers, pursuant to agreement, at 10:30 a. m.

Before: Hon. Harold F. Snead.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Willard P. Owens.

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PROCEEDINGS.

(There was discussion off the record in the absence of the reporter. At 11:50 o'clock a. m. the reporter was summoned and the following proceedings were had:)

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(Plaintiff's requested Instruction No. 2 follows:)

"The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, who were not members of United Construction Workers, or District 50, or United Mine Workers of America without threats of violence or acts of violence against such men, or intimidation of such men by Hart and his men to induce such men to join United Construction Workers."

Mr. Pollard: Your Honor, I think if you are going to award this instruction certainly you ought to omit the words "by Hart and his men."

The Court: Mr. Dudley, this discussion relates to Plaintiff's Instruction No. 2.

Mr. Mullen: This is on the law, acts of violence against such men or intimidation of such men by any one.

The Court: Do you agree to that amendment, "by anyone"?

Mr. Allen: Where is that, Judge?

The Court: On next to the last line.

Mr. Allen: Yes, "by anyone."

The Court: You are asking for the union name to stay there?

Mr. Mullen: It should not carry any specific designation of parties.

Mr. Robertson: I say we are suing the three Defendants and that we have a right in our instructions to say that we had a right to work there and employ men who were not members of any one of the three Defendants. It is the whole theory of our case that Hart came there and said, "This is UCW, United Mine Workers, District 50 territory, and you have to join up or we are going to throw you out."

Mr. Allen: And he stuck up a UMW sign.

Mr. Robertson: Take those pickets there, the three pickets applied to the three Defendants consecutively.

Mr. Pollard: Your Honor, it seems to me that if it is going to be a statement of the law, it would be pure law just to have it read this way:

"The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, without threats of violence or acts of violence against such men, or intimidation of such men by anyone to induce such men to join any union."

Mr. Robertson: Your Honor, this submits the whole point of the instructions. Hart came out there and the burden of Hart's song was that, "This is United Construction Workers territory, District 50, United Mine Workers territory. Join up or we will throw you out." They have a right to an instruction to say, "If you don't believe he did anything like that, the plaintiff has no case," but based on our theory of the case, since the whole burden of their song is what I have said, we have a right to say the plaintiff had a right to come

here and employ and work men who were not members of any of those three defendants without threats or intimidation or violence.

The Court: I will leave the three defendants in. In the next to the last line "Hart and his men" is deleted and in lieu thereof "anyone" is inserted.

Mr. Allen: That discussion was with reference to Instruction No. 2 offered by the plaintiff.

Mr. Pollard: Colonel, will you state your exception?

Colonel Harris: I don't know how you word your exceptions.

Mr. Pollard: No particular wording. Just say we except for the following reasons.

page 2049 } Colonel Harris: All right.

Mr. Lowden: Before he states his exceptions, I don't think I understand yet how it reads. How does the last—

The Court: You strike out "Hart and his men" in next to the last line and insert "anyone" in lieu thereof.

Mr. Lowden: "Intimidation of such men by anyone," and is that where it ends?

The Court: " * * * anyone to induce such men to join United Construction Workers."

Colonel Harris: In No. 2 we except to Your Honor's ruling for the reason that the instruction is confusing; second, for the reason that the instruction is not hypothesized on the evidence; third, the instruction as worded implies and assumes that threats of violence or acts of violence or intimidation were made; fourth, that the United Mine Workers should not be included in that under the undisputed evidence in the case; and fifth, that the United Mine Workers are put in for purposes of prejudice.

Is there any additional ground that you all want to put in?

And on the additional ground that there is no question in this case whatsoever as to the right of the plaintiff to employ anybody, and that it is not a question of the violation of the rights of the men. That is all.

page 2050 } (Plaintiff's Instruction No. 1 follows:)

"The Court instructs the jury it is unlawful to coerce, threaten or intimidate employees and thereby interrupt or destroy an employer's business. The law affords no protection for 'striking' or 'picketing' carried on by means of coercion, threats or intimidation."

Mr. Allen: What did you decide about No. 1, Your Honor?

The Court: You are going to rewrite No. 1 and quote the statute.

Mr. Allen: That is right.

Mr. Pollard: That statute is Section 336.130, Kentucky Revised Statutes 1948.

Mr. Allen: I have that.

Mr. Pollard: I just did that to put it in the record, Mr. Allen.

(Plaintiff's requested Instruction No. 3 follows:)

"The Court instructs the jury that United Construction Workers is a division of District 50 and that District 50 is one of the districts of United Mine Workers of America."

The Court: We will take up Plaintiff's Instruction No. 3. Is there any objection to that instruction?

Colonel Harris: That isn't a true and complete statement of the situation. In their Notice of Motion for page 2051 } Judgment they put it "United Construction Workers affiliated with," and United Construction Workers the way they have it there, all that element of the case is left out. Also on the additional ground that any question of the constitution of the union is omitted there.

Mr. Mullen: And they are separate organizations operating under separate rules.

Colonel Harris: And separate charters.

Mr. Robertson: If Your Honor please, we are not bound by any particular form of words so far as we state in the direct proposition. They have admitted time and time again in different words these facts. They have admitted it once in their grounds of defense. They have admitted it I think in their answer to interrogatories. They have admitted it in these pre-trial conferences. They have admitted in substance and in fact just what I have said there. They have said that United Construction Workers is a division or United Construction Workers is a Division of District 50; and District 50 they have used both ways—they have said it is a constitutional district under Section 20 of the Constitution of the International Union, and they have said it is a provisional district. The case is just shot through with it from beginning to end, and that is a correct statement.

Mr. Allen: If Your Honor please, they have given us the correct terminology in their answer to Question page 2052 } No. 1 of Interrogatories (2) addressed to the United Construction Workers. They say here:

"United Construction affiliated with the United Mine Work-

ers of America (properly stated United Construction Workers Division of District 50, United Mine Workers of America)." They say that is the way to state it. Properly stated, it is United Construction Workers Division of District 50, United Mine Workers of America.

Mr. Mullen: Affiliated with.

Mr. Allen: You refer to affiliated and then you come down and say the proper way to state it.

Colonel Harris: We object to any consideration of the interrogatories. We object on the additional ground that they are basing their charge on our answer to the interrogatory, when the answers to the interrogatories were not properly introduced in evidence and are not properly before the Court to be considered by the Court in framing any instruction to the jury. And all the grounds that we stated in the argument to Your Honor about the proper method of introducing interrogatories as made by Mr. Mullen, as I recall, and that the statutes of Virginia and the customary procedure and decisions of Virginia are such that when you introduce interrogatories you must introduce all of them, introduce them as a whole, and the plaintiff has not done it in this case.

Mr. Allen: I take it, Your Honor, that Defendant's Exhibit 65 would certainly settle the question, which is the Charter granted by the United Mine Workers of America to the United Construction Workers, which reads: "To constitute a local union to be known as UCWD, District 50." And the charter is headed "United Construction Workers Division shall constitute a local union to be known as UCWD, District No. 50, for the purpose of effecting thorough organization of the workers in this industry."

Mr. Robertson: Let me follow that up with this: If Your Honor please, in the grounds of defense of all the defendants signed by them jointly and severally, paragraph 12 reads this way:

"With respect to the unnumbered paragraph beginning on page 14 the defendants admit that William O. Hart, David Hunter, and Thomas Ranev were agents of United Construction Workers and of District 50."

They call them that themselves in their own grounds of defense. What I have stated here is the fact, only I have stated it more accurately than they stated it in there because they have referred to it, for instance, "were the agents of United Construction Workers and of District 50," and nothing more to it at all. But when they have come along in their

interrogatories in places they have said that the United Construction Workers is a division of District 50, and therefore to make it more accurate we said: "The Court page 2054 } instructs the jury that the United Construction Workers is a division of District 50 and that District 50 is one of the districts of United Mine Workers of America."

I say it is correct as submitted and conforms to what they themselves have said in their own grounds of defense.

Colonel Harris: In reply to that, that stated that men were agents of two separate organizations. It didn't state the fact that they being agents for both of them made the both one. As I understood him to read it, it is a question of agency that he read.

Mr. Robertson: If Your Honor please, I don't see how these gentlemen here at this eleventh hour of this trial can now come in here and deny that United Construction Workers is a division of District 50 and that District 50 is a district of the United Mine Workers. The whole record is shot through with it. You take these pre-trial conferences and it appears scores of times.

Mr. Mullen: I think you have missed the entire point that I made.

Mr. Robertson: I didn't hear your point.

Mr. Mullen: My point was that this was not comprehensive, that it should also show that they were operating under the separate rules of each organization and under charters granted to each, District 50 and United Construction Workers.

page 2055 } Mr. Robertson: I don't agree with that at all. I say this is a fact based on their admissions both in their grounds of defense and in their answers to interrogatories, and which they have stated over and over and over again in these trial conferences, and I am entitled to it as it is put forward there because it is a fact, a fact of record in this case.

Mr. Pollard: Your Honor, may I make a correction in what Mr. Robertson read to you from our grounds of defense. He read that we admitted that Thomas Raney was an agent, and paragraph 12 of our first defense correctly reads "With respect to the unnumbered paragraph beginning on page 14 Defendants admit that William O. Hart, David Hunter, and Thomas Davis were agents of United Construction Workers of District 50," and Thomas Raney—

Mr. Robertson: I am not talking about Thomas Raney or David Hunter.

The Court: I think you did say Thomas Raney.

Mr. Robertson: I read it wrong, then. I am not talking about those two men. I am talking about the fact that they said there that United Construction Workers is part of District 50 and that District 50 is a part of the United Mine Workers.

Mr. Mullen: An isolated statement of fact taken out of its context is not the proper instruction.

Mr. Robertson: Mr. Mullen, I don't believe page 2056 } for one minute you will deny—and if you do, if you will take the time I can refresh your memory—that you have admitted here countless times that United Construction Workers is a division of District 50 and that District 50 is a district of the United Mine Workers.

Mr. Mullen: I have said that repeatedly, Mr. Robertson.

Mr. Robertson: Then I am entitled to this instruction.

Mr. Mullen: I also cited the charter under which autonomy was given to District 50 and that they are operating under separate rules and each with its own responsible organization.

Mr. Robertson: Of course you have injected something new there. We claim it doesn't have autonomy because we have shown by the uncontradicted evidence here that John L. Lewis has the right to call the top officers of District 50, and that denies autonomy. This doesn't go into autonomy.

Mr. Mullen: He hasn't done that. That is absolutely contradicted.

Colonel Harris: Even if he has the right to appoint officers, that doesn't deprive them of the constitution and the method of conducting districts in all other particulars, page 2057 } if the Court please.

Mr. Allen: We had a big argument on that. That is not involved in this.

Mr. Pollard: The situation here is this, Your Honor: This instruction is a statement which tends to show agency as given, but there are many other factors which come into the question of agency, and this statement by itself would mislead the jury.

Mr. Robertson: There is nothing in there about agency, Your Honor. It states a fact which they have admitted of record and which we are entitled to set forth to the jury. I am going to read that to the jury, and our argument is going to be, as we have an instruction here later on, that they admit that Hart was the agency of United Construction Workers and they admit that Hart was the agent of District 50. Therefore, if he did the unlawful acts within the scope of his agency, they are hooked and the only question left is whether or not the United Mine Workers is hooked. But we can't put it all out in one instruction.

The Court: The Court will grant Instruction No. 3 as offered.

Colonel Harris: The Defendants reserve an exception to the ruling of the Court, and the grounds of the exception say, first, that the instruction is not full enough; second, that the instruction does not hypothesize the necessary
page 2058 } facts already in evidence; third, that the instruction would mislead the jury on the question of agency and leaves out various and sundry factors which enter into and must be considered in determining the question of agency.

Is there anything you want to add?

Mr. Pollard: No.

The Court: We will recess for the next few minutes.

(Brief recess.)

Colonel Harris: If the Court please, I would like to add as an additional ground of our exception to Instruction No. 3 that it does not sufficiently take into account the fact that the United Mine Workers of America has a separate constitution which is its organic law and that District 50 and the United Construction Workers have their own separate charters, rules, and regulations.

The Court: Now, gentlemen, we may proceed to Plaintiff's Instruction No. 4.

(Plaintiff's requested Instruction No. 4 follows:)

"The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done within the scope of their authority or employment. An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with
third persons.

page 2059 } "It is admitted that William O. Hart and David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case; but it is for you to say whether they were then also agents of United Mine Workers of America, and whether during that period of time they committed the acts charged against them within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them.

"A person acts within the scope of his agency when he is engaged in doing for his principal either the acts consciously and specifically directed, or any other act which is fairly and reasonably regarded as incidental to the work specifically directed, or which is usually done in connection with such work. If in doing such an act the agent acts wrongfully, the wrongful act is nevertheless within the scope of his agency.

"The scope of the agency is to be determined not only by what the principal actually knew of the acts of his agent within his agency, but also by what, in the exercise of ordinary care and prudence, the principal should have known the agent was doing."

The Court: Do you gentlemen have objections to Instruction No. 4?

page 2060 } Mr. Pollard: Yes, sir. Judge, I guess the only way to do this is to take it up sentence by sentence.

Our objection to the first sentence is to "and it is responsible for the acts of its officers and agents done within the scope of their authority or employment."

We think that a union should only be responsible for the acts of its agents which it has authorized, instructed or ratified.

Colonel Harris: Let's look at our instruction, Fred, which covers it more accurately than that, I think.

Mr. Pollard: It is No. 7.

Colonel Harris: No. 7 is our conception of the law.

Mr. Robertson: Are you going ahead on your discussion of the whole instruction?

Mr. Pollard: Yes. Colonel, will you pick it up while I look at something here.

Colonel Harris: The point that Mr. Pollard made is that it is not the full and correct statement of the law as we conceive it to be. It is undisputed in this case that they began to ship coal outside of Virginia before the acts complained of, and we submit that the Norris-LaGuardia Act is a part of the law of Kentucky, and that under the language of that, "None of the defendants can be held responsible or liable for any unlawful acts of individual officers, members, or
page 2061 } acts, except on clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof."

We think that is a more accurate statement than the first and second sentence of the first paragraph of No. 4.

He says it is admitted that William O. Hart and David

Hunter were agents of United Construction Workers and of District 50, and I was under the impression—I may be entirely wrong—that they were agents of the United Construction Workers and any evidence of agency for both is evidence that is in the case from the use of the answers to their interrogatories, which answers have not been made a part of the evidence of the case in accordance with our contention as to what the law of Virginia requires.

The next sentence says it is for the jury to say whether they were also agents for United Mine Workers of America. The undisputed testimony of Mr. Tom Raney is that he had no authority to give any orders to anybody connected with the United Construction Workers.

Then the last clause of that paragraph is subject to the same objection as to scope of their authority or scope of their agency, which is a new way of expressing it. The decisions that I have run across always say “within the scope of their authority,” and he has modified it and changed page 2062 } it to “scope of their agency.”

Then the last paragraph on that page is subject to the same criticism, that it does not follow the principles enunciated in the Norris-LaGuardia Act and is not a correct statement of the liability of the defendant associations in this case.

The last paragraph adds a novel matter on questions of agency, the very last clause, “but also by what, in the exercise of ordinary care and prudence, the principal should have known the agent was doing.”

As applied to a principal and agent, that seems to me to be an enlargement of the law and particularly an enlargement of the law as stated in the Norris-LaGuardia Act. That paragraph is also subject to the criticism that it uses the phrase “within his agency,” which does not have a recognized and commonly accepted meaning within the law.

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Mr. Robertson: If Your Honor please, coming to the first point about trying to bring in the LaGuardia Act and the National Labor Relations Act and those things at this stage of this trial, you remember that those last defenses were interposed here apparently as an after-thought and filed on Janu-

ary 12. At that time the Court deferred its ruling as to whether or not it would permit them to be interposed as defenses. The Court has not yet ruled on that.

Mr. Mullen: I beg your pardon. The Court has an order allowing us to do it.

Mr. Robertson: But not saying whether you could rely on them.

Mr. Pollard: Excuse me for interrupting you, Mr. Robertson, but the Court said that they are in the same class as all the other defenses we have filed.

The Court: I haven't passed on whether you can rely on any of your defenses.

Mr. Robertson: The Court knows what he has page 2066 } ruled on. I say my recollection is that the Court has not ruled whether or not it will permit you to rely on those defenses. If I am wrong, the Court knows it. I think I am right in that particular.

If Your Honor please, take the opening sentence of this instruction:

"The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done within the scope of their authority or employment."

Before I get to that, however, it has been admitted here countless, numberless times, and they have said it in one of their instructions, that this case is governed by the substantive law of Kentucky and the procedural law of Virginia. I am coming back in a few moments to the LaGuardia Act and the other federal statutes. The LaGuardia Act is not a part of the substantive law of Kentucky, and the Taft-Hartly Act and the Wagner Act and the Mann Act are not a part of the substantive law of Kentucky. It has been held in countless union cases and cases of unincorporated associations that they act just as a corporation does, only through their officers and agents. We have a Kentucky case here that says that unincorporated associations can act only through its officers and agents. I speak subject to correction, but I think that is said in the case where the United Mine Workers and page 2067 } John L. Lewis were fined. There was a long discussion of it in there, as I remember it.

"And it is responsible for the acts of its officers and agents done within the scope of their authority or employment."

That is exactly the law. It is the law of Kentucky. While

we are on that phase of it, Your Honor, which is covered in our trial brief, and Mr. Moore is prepared to discuss it, under the law of Kentucky if a principal knows of the acts of his agent and acquiesces in the actions of his agent and fails to repudiate the acts of his agent and accepts the benefits of the agents' acts, then he is liable for the acts of his agents.

There is no use going into the whole thing. I am not trying to cover the entire field here, but I was perfectly amazed at the testimony of Tom Raney, who was put on by them as their witness, who testified that he is a member of the International Executive Board, appointed by John L. Lewis, who can be fired if John L. Lewis chooses to fire him, responsible to John L. Lewis, taking his orders from John L. Lewis. We have here abundant testimony of this pattern of behaviour throughout Eastern Kentucky over a long period of time. We have Tom Raney and David Hunter in this little dinky town up in Kentucky with a three-story little half-rate office building, and their offices are side by side. We have the pattern of behaviour out there which is bound to have come to the knowledge of Tom Raney as a member of the International Executive Board and as accountable to John L. Lewis. That is a matter of circumstantial evidence, the very existence of those facts.

Then what amazed me was when Raney got on the stand and said, "Yes, I help Hunter whenever he asked me to help him to organize the unorganized. I helped him whenever he asked me to, and on at least one occasion I told him to do something."

Mr. Mullen: He never said that.

Mr. Robertson: I hadn't finished, please. I speak subject to correction as long as I am not reading the page. My recollection is, and I know I am right on this, that he talked about those times he went to Frankfort, Kentucky, Lexington, Kentucky, Hazard, Kentucky, and I think there were one or two other places in Kentucky, to give them a push here and a pull there, and I think I am correct when I make the statement that he said at one time he asked Hunter to do something for him or with him, and I made the analogy there that "If John L. Lewis asked you to do something, wouldn't you regard it as a nice way of expressing an order? Then I think it will recall back to Your Honor's memory when I said, "All right, who had the more important position, you or David Hunter?" and he said "I did."

page 2069 } Then, "If you asked David Hunter to do something, wouldn't that be in effect a courteous way of giving David Hunter an order?"

Now you come down to the Coronado case. We are prepared to discuss this in more detail hereafter. The Coronado case has nothing whatsoever to do with this case. The Coronado case has nothing to do with the substantive law of Kentucky. The Coronado case was construing a federal statute. The issues were entirely different. It was under federal law, where there is no federal common law. It was 25 or 30 years ago, and every one in this room knows that the law of labor disturbances and the tort law of every state in this Union today in cases of this kind is different from what it was 25 years ago. So we have no difficulty at all on the Coronado case. We say that opening sentence is exactly correct.

Now we come to the next sentence: "An agent is one who by the authority"—

The Court: Before you go to the next sentence, Mr. Robertson, you said you had a Kentucky case backing up the statement in the first sentence of this instruction?

Mr. Robertson: I think you have that there, haven't you, Mr. Moore?

Mr. Moore: It is speaking of corporations. It concerns a Kentucky law showing not only is the principal
page 2070 } liable for compensatory damages but also punitive damages whether or not he ratifies the act of the agent.

Colonel Harris: What case are you talking about, please, sir?

Mr. Moore: It is on page 21 of our trial brief.

Colonel Harris: I haven't got a copy of that trial brief.

Mr. Mullen: Here it is.

Mr. Moore: On page 21 this case of *Smith's Admix v. Middleton*, 112 Ky. 588, 66 S. W. 388, contains the general reasoning of the Kentucky Court on this question of authorization and if it is all right with Your Honor I would like to read and quote the pertinent part where it is stated in that case.

The Court: Where are you reading now, Mr. Moore?

Mr. Moore: Right here at the bottom. Part of it may be unnecessary but we will quickly get into the part that is.

"It is argued that punitive damages are awarded, in one sentence, as a punishment of the wrongdoer for his negligence, only the one actually guilty should be so punished. It is admitted that a contrary rule exists in this state where the master is a corporation. It is said that in such a case the master can act only by its servants; that from the
page 2071 } necessity of the case the servant, when acting for his employer in the discharge of his duty, is the

master, so far as the act in question is concerned. We are asked to differentiate the liabilities of these two different classes of employers. Why a different rule of liability should be applied to one who is compelled to operate his business by servants, to that apply to one who elects to do so, is not shown, nor are we able to perceive. There seems to have been at one time much contrariety of opinion among the courts on this point, which has later become less marked. In this state we never recognized the distinction now sought to be drawn. The doctrine to us would seem to be unsound, if not pernicious. It would imply that, with respect to all the grossly neglectful acts or intentional acts of the servant in the proposed furtherance of the master's business the law clothed the master with immunity, if the act was right, because it was right, and, if it was wrong, it clothed him with a like immunity because it was wrong. He would thus get the benefit of all his servants' acts done for him, whether right or wrong, and escape the burden of all intentional or grossly neglectful acts done for him which were wrong. Under the operation of such a rule, it would always be safer for the master to conduct his business vicariously than in his own person. The public are invited to deal with the servant concerning his master's business. Through him only can the business be transacted, if the page 2072 } master so wills. Then for his intentional or grossly neglectful act done within the scope of his employment the one dealing with him would be left without a remedy. This would be an inducement to one engaged in a specifically hazardous business conducted by means of financially irresponsible agents, because if they should succeed in the business the master would get all the profits, while, by their gross negligence or willful act injury resulted to another, the master and his business would not be hurt, so far as direct punishment was involved."

I think that is adequate for the point Mr. Robertson is making.

Mr. Pollard: What type of tort was involved in that case, Mr. Moore?

Mr. Moore: The decedent was killed by an error of defendant's drug clerk in selling morphine for calomel and placing it in a box labeled "calomel $\frac{1}{4}$ grain."

Mr. Pollard: That was not a willful tort.

Mr. Moore: In Kentucky gross negligence is the same as a willful tort, and it makes the principal liable for punitive damages. That was such gross negligence that punitive damages were allowed.

Mr. Allen: Did you read from *Memphis and C. Packet Co. v. Nagel*, 97 Ky. 29 Southwestern?

Mr. Moore: Go ahead and read it if you have page 2073 } it there.

Mr. Allen: *Memphis and C. Packet Co. v. Nagel*, 97 Ky. 29 S. W. 743. The court there said:

"Appellant contends, further, that exemplary damages should not be awarded against a corporation for the acts of its servants unless it expressly authorized the act as it was performed or afterwards ratified it, or was negligent in employing its servant or retaining him in its employ; and for this he quotes Mr. Sedgwick on Damages (volume 1, Section 380.) True, the learned author says such a rule obtains in many jurisdictions. Fortunately, it has never obtained in Kentucky and we are not now so impressed with its soundness or authority as to undertake to ingraft it on our jurisprudence. Of little value to the injured and outraged passenger would all other declarations of law be if this rule obtained as stated. The later and better rule seems to be that corporations are liable for the acts of their servants committed within the scope of their employment, as by the master of a steamboat or the conductor of a railway with reference to their passengers. This rule has often been applied in Kentucky."

Then referring to another Kentucky case, *Grant* against *Taylor*, 4 S. E. (2d) 741, 1938, the Court said:

"And a corporation, as well as a natural person, may be held liable in punitive damages for injuries in-
page 2074 } flicted by the tortious acts of employees com-
mitted within the scope of their authority."

Then there are Kentucky cases exactly to the same effect.

Then follows the Middleton case that Mr. Moore read from.

I have read all of these Kentucky cases myself personally and have analyzed them and I have copied some of the instructions from those cases that were given and have them appended hereto. If I can read and understand the English language, the Kentucky law is if a corporation or labor union or a private person acts as agent and that agent doesn't act within the scope of his employment, it doesn't make any difference about what sort of manner he uses or how far he steps aside or how violent he gets or anything of the kind, if the agent personally would be liable, then his principal is liable. That is the law of Kentucky as I understand it, and it is the law of a great many states. I was surprised to find

it so, not only as to statutory damages, but punitive as well.

Mention has been made here, if Your Honor please, of the Norris-LaGuardia Act and the constitution of the United States and what-not. Before I embark upon a discussion of the Constitution which we expect to make that none of those

federal laws have anything to do with this case, page 2075 } that none of them can be pleaded here as a de-

fense in any way, shape or form, I do want to refer to the fact that the clause cited from the Norris-LaGuardia Act that labor unions are not responsible unless the acts were specifically authorized or expressly ratified, has been amended by the Labor Relations Act of 1947, which is commonly known as the Taft-Hartley Act, and that provides—

Mr. Moore: In Section 2.

Mr. Allen: —provides, “in determining whether any person is acting as an agent of another person as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.”

I cite that just to show that the law cited by my friend over there wasn't brought down to date. But our contention is that none of those acts have anything to do with this case.

The Notice of Motion doesn't refer to any of those acts in any way, shape or form. The Notice of Motion simply sets forth, as my friend, Mr. Robertson, would express it, the ordinary garden variety of simple torts, except in respect to the aggravated nature of the tort. The only case that I have been able to find where the notice of motion contained the allegation that this notice of motion contained and the De-

fendants tried to bring the case under the federal law is a case decided by the United States

District Court in Massachusetts, *H. N. Thayer Co. v. Binnall, et al.*, 82 Fed. Supp. 566. I will read you the facts in that case. I have my memorandum from it, and I have the book itself here if anybody wants to see it.

“The bills of complaint allege, in substance, that the plaintiffs have entered into collective bargaining contracts with the Thayer's Workers' Council and the H. N. Thayer's Workers' Council, as the collective bargaining representatives of the employees of the respective companies.”

The facts show that in this case contracts were entered into very similar to the types of contracts which were entered into here by Mr. Bryan and the American Federation of Labor and the Richmond City Trades Council.

"* * * that these contracts are still in force and that the companies have no contracts with the aforesaid local union 154 * * *"

We will say that is that local union over there of United Construction Workers, 788-A, I believe it was, wasn't it?

"* * * it is alleged that local union 154 has injured the plaintiffs by calling a strike at their respective plants, by inducing employees of the plaintiffs to violate the existing contracts by engaging in the strike, and that this was done for the purpose of compelling plaintiffs to violate their contracts with the respective workers' councils * * *"

The Richmond City Trades Council here.

"* * * and to enter into contractual relations with local 154 * * *"

Which is 778-A out there.

"* * * which has not been certified by the National Labor Relations Board as bargaining representative of plaintiffs' employees."

This 778-A had not been certified as a bargaining agent for the United Construction Workers.

"It is further alleged that defendants, many of whom are not employees of plaintiffs, have engaged in large numbers in picketing, obstructing entrances to plaintiffs' plants, intimidating employees and others who wish to enter the plants, and have prevented trucks of public carriers from entering plaintiffs' premises."

Mind you, a lot of these people who were engaged in this picketing were not employees of the plaintiff or employees of the men at the plant, but were employees of someone else.

Let's see what the similarities are between the two cases. In the Laburnum case Mr. Bryan had a contract with the A. F. of L. to furnish A. F. of L. labor on all of his jobs. His contract was made with the local trades union here, affiliated with the A. F. of L. Mr. Bryan, so far as the evidence shows here, had not applied to the Labor Relations Board for certification of the bar-

gaining agent for his employees, and that was the same situation in this case.

In this case, representatives of the United Construction Workers came to the place where Laburnum Construction company had their job site in Breathitt County and tried to get the Laburnum workers to join the United Construction Workers with a view to forcing Mr. Bryan to bargain with representatives of the United Construction Workers. In the Thayer case No. 154 and their representatives appeared on the job and tried to organize plaintiff's employees with a view to eventually forcing the Thayer company to recognize them as the bargaining representative of their employees on the job. In both cases the outside unions were trying to make the plaintiffs' employees break their contracts with the plaintiff. In Mr. Bryan's case he had a contract to employ A. F. of L. labor. On this particular job I believe he had permission also to employ others who were not members of any union if he couldn't get A. F. of L. men there.

It is significant that in neither case had the plaintiffs' employees been certified as bargaining units by the National Labor Relations Board. In both cases the outside union representative employed violence, threatened and intimidated the plaintiffs' employees.

The judge comes on and gives the law and he page 2079 } refers to the National Labor Relations Act and any other labor law that is claimed to be applicable. Quoting now from the opinion: "Section 303(b) gives this court," that is the federal courts "jurisdiction over suits for damage to business or property resulting from violation of the secondary boycott * * *"

A secondary boycott as described in that act means, a case like this, for instance: Take a grocery store that sells a lot of meat and they are having trouble there, and then they go to the manufacturer or the wholesaler who sells to that local man and tell him that "We are on strike down there, and if you don't stop selling to that man we are going to boycott your stuff." That is what they are talking about as a secondary boycott.

"* * * and jurisdictional strike provisions of 303(a)—"

That simply means a question of two local unions fighting over which has jurisdiction of the particular plant, two local unions in the same big union.

"* * * But the conduct of the defendants set forth in complaints here does not involve a secondary boycott or a juris-

ditional strike," and it does not here, "and is not such as to constitute a violation of section 303(a). It is true that it is alleged that local 154 and its members, the defendants, have engaged in a strike against the plaintiff-
page 2080 } employers here, and have encouraged others to do so, but this falls within the prohibition of the Act only when done for one of the objects enumerated in this section. There is nothing to indicate such a purpose here. Nothing appears to indicate any activity here for the objects listed in Section 303(a), and (3) and (4)."

Mr. Lowden, if you have the section there, you can read 303(a) (3) and (4) so we will see that none of the objects there are involved here in our case; if you haven't, I have it here.

Mr. Lowden: 303?

Mr. Allen: 303(a).

Mr. Lowden: It shall be unlawful for the purposes of this section only industrial activity affecting commerce for any labor organization to engage in or to induce or encourage the employees of any employer to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process—"

Mr. Allen: Note that, to use, manufacture.

Mr. Lowden: "—transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is (1) forcing or requiring any employer or other self-employed person to join—"

Mr. Allen: Note, employer or self-employed person.

Mr. Lowden: "—to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor or manufacturer, or to cease doing business with any other person;

"(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employ unless such labor organization has been certified as the representative of such employees under the provisions of Section 9 of the National Labor Relations Act;

"(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9 of the National Labor Relations Act;

"(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) * * *"

The rest of that is not applicable but we might as well finish it.

"—if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act."

Mr. Allen: The Court here says:

"There is nothing to indicate such a purpose. Nothing appears to indicate any activity here for the objects listed in Section 303(a) (3) and (4), but defendants contend that the complaints alleged unlawful activity for the objects named in 303(a), (1) and (2). But there is no allegation here of any attempt to require any employer or self-employed person to join any organization. And in so far as the activities of defendants have been directed toward the plaintiff-companies themselves, there is no indication of any purpose to require these companies to cease in any way from doing business with other persons * * * The object of the strike is alleged to be to require bargaining with a labor organization not certified under the Act as the bargaining representative of the employees. But it is the plaintiff-companies themselves and not any other employer who would be forced to bargain with the uncertified union."

Continuing: "The defendants would violate the Act if they induced or encouraged employees of any employer other than the plaintiffs 'to engage in a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services' with the object of forcing such other employer to cease to do business with the plaintiffs or with the object

of forcing the plaintiffs' employers other than the employer of the employees thus induced to act to bargain with the uncertified union. But the complaint makes no allegation of an inducement or encouragement of a strike or of any concerted action by employees of any one except the plaintiffs. Defendants contend such an allegation can be found in the statement of the complaint of the defendants and their associates who are on the picket lines have refused to permit public carrier trucks that normally transport goods to and from the plants of these plaintiffs to enter upon the plaintiff's premises. This is too vague a statement to be construed as an allegation of encouragement or inducement to action by the employees of such carriers, much less as an effort to encourage concerted action on their part. In the light of its context, the statement amounts to no more than a specific allegation

page 2084 } of the general charge that the pickets have unlawfully interfered with free access to the plants.

"Plaintiffs in their complaints have nowhere expressly laid claim to any right or remedy given them by any federal law. They contend that their complaints are based solely on alleged unlawful interference with their contractual rates and the right to do business as given to them by the common law of Massachusetts, and that they ask only the remedy of injunction traditionally available to them under the equity courts of the courts of that state. A fair interpretation of their bills of complaint shows that that is the only cause of action which they purport to set forth. To construe these bills as stating a cause of action which plaintiffs may have under federal law, but which they have elected not to pursue, would be a tortured interpretation of them which I cannot adopt.

"Therefore, I conclude that the complaints do not state any cause of action based on the constitution or laws of the United States and, in particular, on the Labor-Management Relations Act of 1947. Diversity of citizenship being lacking, the case is not one over which this court has jurisdiction, and the cases are remanded to the court from which they were removed."

That case involved an injunction, and if that court could have found any authority whatsoever in the federal law upon the statement of facts and the facts as they appeared in the case, it would have had jurisdiction, but the federal court says under the complaint that all these people contend here is there that you, by unlawful picketing, by unlawful interference through picketing and violence and intimidation and that sort of thing, did these

page 2085 }

people a wrong. That is all I see in the case. "There is no federal law involved in it, and you go back to the state court and litigate that out."

That is exactly the situation that I see we have here. The federal law has nothing to do with this thing in any way, shape or form, and any rights which they may claim under it should not be permitted.

Your Honor, will I am sure, remember that when they filed their defenses we preserved our exception, preserved our objection. I remember stating then myself distinctly—I was sitting where Mr. Robertson is now—the objection and exception, and I think we all joined in it.

In addition to all of that, Your Honor, when they were called upon to state their grounds of defense, they stated them—

The Court: We will adjourn until 2:15. It is now after one o'clock.

(Whereupon, at 1:05 o'clock a. m. the conference was adjourned until 2:15 o'clock p. m. the same day.)

page 2086 } AFTERNOON SESSION.

2:15 p. m.

Mr. Allen: Your Honor, I had just about concluded what I had to say on that phase of the case. Of course, it was apparent that the discussion of the questions involved in the case that I read from came up upon a motion to remand the case from the federal court to the state court. The case was originally brought in a state court. Of course as every lawyer knows, when a case is removed from a state court to a federal court, and a motion is made to remand it, the federal court has to go by the cause of action as it is stated in the complaint. No federal questions that may be raised by answers or defenses would come up.

The point I was making was that in that case the judge dealt with all the offenses that could come up under the federal law in an act of this kind. The case on its facts was exactly like ours, and in dealing with the case from a factual standpoint the court decided that no federal question was involved.

The Sherman Act and the Norris-LaGuardia Act, too, I believe, had that provision about authorizing and ratifying the acts of an agent. I know the Norris-LaGuardia Act had it. The cases construing the Norris-LaGuardia Act hold that that

applies only in a federal court, and the Norris-LaGuardia Act expressly says so.

page 2087 } Now we come on to the amendment to the Labor Relations Act of 1947, referred to as the Taft-Hartley Act. It is provided there that agency shall be determined not alone by whether the act was authorized or ratified, and that applies to cases in both federal and state courts. However, our contention is first, last, and all the time that we have nothing but the simple ordinary state question here involved.

Now I turn to the discussion on that phase of the case over to Mr. Lowden.

Mr. Lowden: If Your Honor please, the question under discussion, as I understand it, is their responsibility for acts of their agents, and we are contending, and I think rightfully, that their responsibility is just the same as it is for a corporation, and that they are responsible for the acts of their agents done within the scope of their authority or employment.

If you reflect upon it for a moment, it is apparent that that is bound to be the rule. This defendant, United Mine Workers of America, has 440,000 members; it owns office buildings in Washington; it is a tremendous organization. Right on the face of it, it seems to me apparent that they are responsible just the same as anybody else. In Kentucky you will find the Kentucky court of appeals expresses that idea. I am not talking about agency, but in *Chapman v. Commonwealth*, 294 Kentucky, 631, 172 S. W. (2d) 228 (1934), page 2088 } the Court, after having finished its opinion, takes time out to lay down the law that labor unions in Kentucky are going to be treated just like everybody else and have no special privileges.

I am not going to go back and cover it again, but there was read this morning a part of the memorandum of authorities in the trial brief given on page 18 and the following pages with respect to the liability of corporations for acts of their agents. We submit that that liability is the same in Kentucky for unincorporated associations.

In 4 American Jurisprudence, page 483, the following general statement of the law is made:

"An association is liable for a tort committed by its servants or agents in the course of their service. Organizations called into being by the voluntary action of individuals forming them for their own advantage, convenience, or pleasure, being but aggregations of natural persons associated together by their free consent for the better accomplishment of their purposes are bound to the same care in the use of their prop-

erty and the conduct of their affairs to avoid injury to others as are natural persons, and a disregard or neglect of that duty involves a like liability."

In a recent Kentucky case, *Jackson v. International Union of Operating Engineers*, 211 S. W. (2d) 138 (1948), the court points out, in a case which involved the right to
page 2089 } sue an unincorporated association in its own
name, that Section 208 of the Kentucky constitution provides that "The word corporation as used in this constitution shall embrace joint-stock companies and associations."

They pointed out that Section 446.010 of Kentucky Revised Statutes provides:

"'Corporation' may be applied to any corporation, company, partnership, joint stock company or association."

Then they go on to say:

"We have just shown by reference to the Kentucky constitution and statute that there is authority to sue such concern as it is treated as a corporation."

This morning reference was made to the case of *Blandford v. Press Publishing Company*, 286 Kentucky 657, 151 S. W. (2d) 440. If I understood the statement correctly, the representation was made to the Court that that case holds, dealing with labor matters, that Kentucky applies the federal law. I say the case holds no such thing as that at all. The case does hold—and it is obviously correct—that the constitutional guarantee of free speech in the federal Constitution overrides any law of Kentucky. Nobody here denies that. They say that if the Supreme Court of the United States states that a certain act is an exercise of freedom of speech, their court would be bound by that, and I think everybody
page 2090 } agrees to that. But there isn't a single word
here that I see in the case that says anything
about applying the federal law of agency in Kentucky just because someone is an unincorporated association.

They say that the Norris-LaGuardia Act's definition of agency should be applied, and I think that we ought to read to the Court what that statute really says. It is Section 6, which says:

"No officer or member of any association or organization,

and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for unlawful acts of individual officers, members or agents, except upon clear proof of actual participation in or actual authorization of such acts or ratification of such acts of actual knowledge thereof."

So, this statute is talking about what will happen in courts of the United States and has nothing whatever to do with the courts of Kentucky or the courts of Virginia or the courts of any other state, because "courts of the United States" in this statute refers to federal courts and the title of the act is "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes."

I think it is fundamental that the Congress of the United States hasn't got anything whatsoever to do
page 2091 } with the jurisdiction of this court, which is fixed by the Constitution of Virginia and our Assembly, and they have no power to affect the jurisdiction of a state court.

So it is apparent right from the words of the statute and the decisions of the court that the Norris-LaGuardia Act has nothing whatsoever to do with the substantive law of Kentucky.

Even assuming that Kentucky should apply the federal rules of agency, I submit to you that the federal rules of agency at the present time are exactly what we are contending for, and I think you will find the most recent expression of that view is found in the Sunset Lines and Twine case recently decided by the National Labor Relations Board, which Mr. Moore will read.

Mr. Moore: The full name of this case is International Longshoremen's and Warehousemen's Union, CIO and Local 6 International Longshoremen's and Warehousemen's Union, Sonoma County Division and Sunset Lines Twine Company, 79 NLRB, Case No. 207, and was decided in 1948. In this case it was urged that the respondent unions by their officers and agents restrained and coerced employees of the company by intimidation of bodily harm and mass picketing. The union had struck because it alleged the company refused to bargain. The intimidation was against the employees who remained on the job. In holding the International Union responsible for the acts of the local agents the
page 2092 } Board stated the following at page 1507:

"Therefore, the only question before us is whether or not

the conduct of these individuals (local agents) can properly be imputed to one or both of the respondent unions, for, unless the record justifies that imputation, there was no violation of the act in this case. In determining whether or not the evidence does afford a basis for holding the unions responsible for the episodes in question, the Board has clear statutory mandate to apply the 'ordinary law of agency.' For this purpose we are to treat labor organizations as legal entities, like corporations, which act and can only act, through their duly appointed agents, as distinguished from their individual members."

The Court: Are there any further observations, gentlemen?

Mr. Pollard: Yes, I would like to make some, Judge, if I may.

The Court: All right, sir.

Mr. Pollard: First, in the case cited by Mr. Allen, the Labor Relations Act in the section he cited, which I think was 301—was it, Mr. Allen?

Mr. Allen: 303.

Mr. Pollard: 303. —specifically sets up certain situations in which an employer may sue a union for damage page 2093 } ages. They have to fit those cases. I think there are four different situations. All the court did in that case was to say that the facts of this case were not one of the four cases in which the National Labor Relations Act permits an employer to sue a union. So that case has no bearing here.

Secondly, we are dealing here with an alleged willful tort. The Plaintiff has cited no case in Kentucky which lays down the rules of liability for acts of agents with respect to unions. They have cited no cases that deal with intentional torts in Kentucky. We have cited a case that deals with an intentional tort, the Newberry Case, a case of libel and slander, where ratification, authorization or participation was required in that type of tort.

Thirdly, in the notice of motion for judgment, on page 14 thereof, beginning 12 lines from the bottom, the plaintiff alleges as follows:

"The said United Mine Workers of America, said District 50, and said United Construction Workers, each jointly and severally ratified, approved, and confirmed and authorized the said acts of William O. Hart and his mob against the plaintiff in Breathitt County, Kentucky, for the purpose of willfully, maliciously and unlawfully attempting to destroy

plaintiff's business and to prevent plaintiff from further continuing lawfully to work within the State of Kentucky unless and until the plaintiff submitted to their demands to permit United Construction Workers to become the bargaining agent for plaintiff's employees."

That is an allegation that they have made in their Notice of Motion, and we submit that they are bound by it and have to prove it, and that that is what the instruction should be to the jury.

* * * * *

page 2099 } Just to reiterate the four things that I mentioned, sir, they allege ratification, authorization, and participation in the Notice of Motion; they have cited no Kentucky cases dealing with the question of agency with respect to labor unions; they have cited no Kentucky cases dealing with an intentional tort, whereas the case we cite says that in the case of intentional tort, ratification, participation, and authorization is necessary. We rely on the Coronado case, which I have just read, which is certainly still the federal law and, we think, the law of Kentucky in the absence of any other showing.

Colonel Harris:

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page 2102 }

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The jurisdiction of the National Labor Relations Board doesn't enter into this case at all.

* * * * *

Mr. Pollard: Your Honor, may I add just one thing. The rules of the Construction Workers, the rules of District 50, and the Constitution of the International Union all prohibit the calling of a strike until it has been approved by the respective unions. So the Supreme governing law of each union requires ratification. If the governing law of each union requires ratification, I don't see how we can enforce any other rule against them.

The Court: Does Colonel Harris have something else to

say? You were conferring and I didn't know whether you had something else to say or not, Colonel.

Colonel Harris: That was a part of the decision that I did not read, the Blandford case, in which this was said:

"However, on February 3, 1941, the Supreme Court of the United States in the case of the *United States v. Hultcheson*, held that the Norris-LaGuardia Act—"

Mr. Allen: What are you reading from?

Colonel Harris: I am reading from the Blandford case, the law of Kentucky.

"—held that the Norris-LaGuardia Act, 29 U. S. C. A. had 'removed the fetters upon trade union activities', a result allegedly sought to be accomplished by the Clayton Act and 'explicitly formulated the public policy of the United States in regard to the industrial conflict and by its light page 2106 } established that the allowable area of union activity was not to be restricted as it had been in the Duplex case, to an immediate employer-employee relationship.'"

They started off their case and said they were going to show a pattern. They haven't shown a pattern, and now they want this court to change the law of agency.

Mr. Robertson: If Your Honor please, I don't know how long you want to continue this. I don't think this last observation merits consideration. It is such a misstatement of facts that I won't dignify it by a reply to it.

We start out here with the *reiteration* time and again that the substantive law of Kentucky applies to this case, not the Norris-LaGuardia Act, not the Taft-Hartley Act, not the Clayton Act, not the Sherman Act, not anything but the garden variety law of Kentucky.

We have in our trial brief here—and Mr. Moore is prepared to answer it again, or if the court wants to take it home with him, he can read it again—that in Kentucky you do not have to have prior authorization, you do not have to have subsequent ratification. If you acquiesce in what is done and do not repudiate it and accept the benefits of it, you are bound by it as the act of agency. That has been repeatedly said. It is in the brief and I won't say anything more about it now.

The Coronado case is a federal case for a page 2107 } federal statute and construed by a federal court, and it has nothing to do with the garden variety

law of torts in Kentucky. The Coronado case does not apply in this case for those reasons. Both Mr. Allen and Mr. Lowden have read that case since I have, and they are prepared to argue that just as long as the court wants to hear them. I could argue it too, but I won't say anything more about that.

About a pattern, about no acts of violence, I won't dignify that. I assume that the Court remembers the testimony in this case and that when such unwarranted statements are made as have been made here that the Court was challenging them in his own mind.

It has been agreed that substantive law of Kentucky applies. It has been shown here that the Coronado case was construing a federal statute which says that it shall apply only in federal courts. We have shown a pattern here throughout Eastern Kentucky, and we have shown more than that by circumstantial evidence, and it is just an affront to your intelligence to say it has no weight. All three of these defendant unions are bound to have known what Hart and David Hunter and Tom Raney were doing. They acquiesced in it, and to this moment they have not repudiated it and to this moment take the benefits of the thing by having demonstrated their power in running us out of Kentucky.

I am going to ask that either Mr. Allen or Mr. Lowden speak, if the Court wants to hear any more. I don't know how much longer the Court wants to go.

The Court: Let's bring it to a close, although I want you to have a full opportunity to discuss the question.

Mr. Allen: If Your Honor please, the question of agency and the question of prior authorization and subsequent ratification are coming up at nearly every instruction that is going to be offered from now on by us and by them. It runs through them all. I think we might as well meet this question squarely and let everybody say everything that is to be said on it, and hereafter when the instructions come up, maybe we can just let Your Honor pass on them from the arguments you have heard. There isn't any use in repeating this argument on every instruction that involves the question of agency. We are now getting to ours. Every one of them involves that question.

I would like to give my respects to the Coronado case. I have studied the case carefully. I am going to confine myself in explaining the case largely to what the appeal itself says.

The opinion was rendered by Chief Justice Taft. I am reading from the facts now as he states them.

"The defendants in the Court below were the United Mine Workers of America and its officers, District 21 of the United Mine Workers of America, and its officers, 27 page 2109 } local unions in District No. 21 and their officers, and 65 individuals, most of them members of one union or another, but including some persons not members. All of them were charged in the complaint with having entered into a conspiracy to restrain and monopolize interstate commerce in violation of the first and second sections of the Antitrust Act, and with having in the course of that conspiracy and for the purpose of consummating it, destroyed the plaintiff's property. Treble damages for this and attorneys' fees were asked under the 7th section of the Act. The trial resulted in a verdict of \$200,000 for plaintiffs, which was trebled by the court, and to which was added a counsel's fee of \$25,000 and interest in the amount of \$120,600 from July 17, 1914, to the date of destruction of the property, November 22, 1917, the date upon which the judgment was rendered. The verdict did not separate the damages," and so forth.

This was reversed as to interest but in other respects the judgment was affirmed by the United States Court of appeals.

So mind you now, the cause of action there was a conspiracy entered into by all of these parties to monopolize and restrain interstate commerce, and in the course of carrying out that conspiracy, destroyed the plaintiff's property.

"Of the nine companies of which the plaintiff was receiver and for which he was bringing the suit, five were page 2110 } operating companies engaged in mining coal and shipping it in interstate commerce. The defendant, the United Mine Workers of America, is alleged to be an unincorporated association of mine workers governed by a constitution, with a membership exceeding 400,000, subdivided into 30 districts and numerous local unions."

Right here let me remind you that it is divided into 31 districts now, but long after this suit, back in 1936 this district 50 was created, which we shall presently show is entirely different from other districts and actually all through, ever since its organization, has been acting as agent of the United Mine Workers in organizing these industries outside of the coal mines. We will pass that for the present.

"These subordinate districts and unions are subject to the constitution and by-laws not only of the International Union but also have constitutions of their own."

We are going to show you that their constitutions have been changed since that.

"The object of the conspiracy of the United Mine Workers and the union operators acting with them is the protection of the union-mined coal by the prevention and restraint of all interstate trade and competition in products of non-union mines. The complaint enumerates states in which coal mining is conducted and alleges that the coal mined in page 2111 } each comes into competition in interstate commerce directly or indirectly with that mined in Illinois, Kentucky, Alabama, New Mexico, Colorado, Kansas," and a number of other states there.

"But for the Defendants' unlawful interference, Plaintiffs would have engaged in the trade in 1914 in all those states.

"The plaintiff said that in April, 1914, the defendants and those acting in conjunction with them in furtherance of the general conspiracy already described to drive non-union coal out of interstate commerce and thus to protect union operators from non-union competition, drove and frightened away the plaintiff's employees, including those directly engaged in shipping coal to other states, prevented the plaintiff from employing other men, destroyed the structures and facilities of the mine, loading and shipping coal, and the cars of interstate carriers waiting to be loaded as well as those already loaded with coal in and for interstate shipment, and prevented plaintiffs from engaging in or continuing to engage in interstate commerce. The complaint alleges that the destruction to the property and business amounted to the sum of \$740,000, and asked judgment for three times that amount or \$2,220,000."

Your Honor knows that under the Antitrust Acts you treble the damages and also add attorneys' fees on top of that.

page 2112 } "Certain of the funds of the United Mine Workers in Arkansas were attached. The defendants, the United Mine Workers of America, District No. 21, and each local union and each individual defendant filed a separate answer. The answers deny all the averments of the complaint."

Coming on down to the questions, he said:

"The third is that there is no evidence to show any agency by the United Mine Workers of America in the conspiracy charge or in the actual destruction of the property, and no liability therefor.

"The fourth is that there is no evidence to show that the conspiracy alleged against District No. 21 and the other defendants was a conspiracy to restrain or monopolize interstate commerce."

Then they discuss those questions at some length.

"The next question is whether the International Union was shown by any substantial evidence to have initiated, participated, or ratified"—note the word "initiated"—"participated in, or ratified interference with Plaintiffs' business which began April 6, 1914, and continued at intervals until July 17 when the matter culminated in a battle and the destruction of the Bache-Denman properties. The strike was a local strike, declared by the president and officers of the district organization No. 21, embracing Arkansas, Oklahoma, and Texas. By Section 16 of the International Constitution, as we have seen, it could not thus engage in a strike if it involved all or a major part of its district members, without sanction of the International Board. There is nothing to show that the International Board ever authorized it, took any part in the preparation for it or in its maintenance. Nor did they or their organization ratify it by paying any of the expenses. It came exactly within the definition of a local strike in the constitutions of both the International and the district organizations. The district made the preparations and paid the bills. It does appear that the president of the National Body was in Kansas City and heard of the trouble which had taken place on April 6 at Prairie Creek, and that, at the meeting of the International Board, he reported something he had learned—"

Now he goes on dealing with a number of things that they heard about it. The question in my mind is whether that would be ratification under the Kentucky law, but I pass over that. Coming to the question directly in point:

"A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are *ultra vires* the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against a unincorporated organization like this"

"But it is said that the district was doing the work of the International in carrying out its policies, and this circumstance makes the former

agent. We can not agree to this in the face of the specific stipulation between them that in such a case unless the International expressly assumes responsibility, the district must meet it alone."

Now they are talking about the strike that was called and wasn't sanctioned. Up there they were talking about the business of the union that was being carried on. If the agent or the local union or whatever it was, was carrying on the business of the International Union, they would be liable on that theory.

"We conclude that the motion of the International Union, the United Mine Workers of America, and of its president and its other officers that the jury be directed to return a verdict for them should have been granted."

"The next question is two-fold: Whether District No. 21 and the individual defendants participated in a plot unlawfully to deprive the plaintiffs of their employees by intimidation and violence and in the course of it destroyed their property, and whether they did these things in pursuance of a conspiracy to restrain and monopolize commerce."

They discussed interstate commerce at length, whether coal mining was interstate commerce and all that sort of thing.

page 2115 } "The evidence leaves no doubt that during the month of June there was a plan and a movement among the union miners to make an attack upon Prairie Creek Mine No. 4. On the date of the 16th the union miners' families who lived in Prairie Creek were warned by friends to leave that vicinity in order to avoid danger, and at four o'clock the next morning the attack was begun by the volley of many shots fired in the premises, and a large force with guns attacked the mining premises from all sides later on in the day. The overwhelming weight of the evidence establishes that this was purely a union attack under the guidance of District officers. It is a doubtful question whether this responsibility was not so clearly established that had that been the only element needed to justify a verdict, the court might properly have directed it. It is contended on behalf of District No. 21 and the local union that only local members of these bodies whom the evidence shows to have participated in the talks can be held similarly liable for the damages. There was evidence to connect all these individual defendants with the acts which were done, and in view of our findings that District No. 21 and the unions

are suable we can not yield to the argument that it would be necessary to show the guilt of every member of District 21 and of each union in order to hold the union and the strike fund to answer. District No. 21 and the local unions were engaged in a work in which the strike was one of the chief instrumentalities for accomplishing the purpose for which their unions were organized. Thus the authority is put by all the members of the union, District No. 21, in their officers to order a strike, and if in the conduct of their strike unlawful injuries are afflicted the district organization is responsible, and the fund accumulated for strike purposes may be subjected to the payment of any judgment which is recoverable. It is necessary, however, in order to hold District No. 21 liable in this suit under the antitrust act to establish that this conspiracy to attack the Bache-Denman mines and to stop non-union employment there was with intent to restrain interstate commerce and to monopolize the same, and to subject it to the control of the union."

He went on that interstate commerce was involved.

"The plaintiffs charge there is and has been a continuing operating conspiracy between the unions and the coal operators and the International Union to restrain interstate commerce in coal and to monopolize it and that the work of District No. 21 at Prairie Creek was a step in that conspiracy which it can be held liable under the antitrust act. Coal mining is not interstate, and the power of Congress does not extend to its regulation as such. Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it of course may affect it by reducing the amount of coal to be carried in that commerce. It is clear from these cases that if Congress deems certain recurring practices, though not really a part of interstate commerce, likely to obstruct, restrain or burden it, it has the power to subject them to national supervision and restraint. Again, it has the power to punish conspiracies in which such practices are part of the plan to restrain or monopolize interstate commerce. But in the latter case the intent to injure, obstruct, or restrain from interstate commerce must appear as an obvious consequence of what is to be done or to be shown by direct evidence or other circumstances.

"If unlawful means had been used by the national body to unionize mines whose product was important actually or potentially in affecting prices in interstate commerce, the evi-

dence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the anti-trust act. This principle is involved," and so forth. They go on off and cite other cases. Then, to wind up:

"And so in the case at bar, coal mining is not interstate commerce, and obstruction of coal mining, though it may prevent coal from going into interstate commerce, is not a restraint of that commerce unless the obstruction to mining is intended to restrain commerce in it or has necessarily such a direct, material, and substantial effect to restrain commerce in it that the intent reasonably must be inferred. page 2118 }

In the case at bar there is nothing in the circumstances of the declarations of the parties to indicate that Stewart, the President of District No. 21, or the secretary-treasurer or any of their accomplices had in mind interferences with interstate commerce or competition when they entered upon their unlawful combination to break up Bache's plan to carry on his mines with non-union men * * *.

"Stewart said, 'We are not going to let them dig coal, the scabs.' His intention and that of his men was fastened upon the present non-union men in the mines in that local community. The circumstance that a car loaded with coal and hilled to a town in Louisiana was burned by the conspirators has no significance upon this case. The car had been used in the battle by some of Bache's men for defence. It offered protection, and its burning was only a part of the general destruction.

"Nothing of this is recited to justify the slightest lawlessness or outrages committed, but only to point out that as it was a local strike within the meaning of the international and district constitutions, so it was in fact a local strike in its origin and motive, local in its waging and local in its *felious* and murderous ending. District No. 21 in Arkansas, Oklahoma, and Texas would become non-union," and so forth.

"The result of our consideration of the entire page 2119 } record is that there was no evidence submitted to the jury upon which they properly could find the outrages, felonies and murders of District 21 and its companions in crime were committed by them in a conspiracy to restrain or monopolize interstate commerce. The case has been prepared by counsel for the plaintiffs with rare assiduity and ability. The circumstances have been such as to cause regret that in our view of the federal jurisdiction we can not affirm the decision, but it is of far higher importance that we should preserve inviolate the fundamental limitations with respect to the federal jurisdiction."

So the case went off on a question of federal jurisdiction. It was decided on a question of federal jurisdiction, and the lack of federal jurisdiction was inherent in the charge that certain miners, certain labor unions, including the international union, joined in a conspiracy to obstruct and affect the interstate commerce. The case has nothing in the world to do with what we have here. It does apparently place labor unions on the basis of corporations and it does intimate clearly that it has been shown in that case that if District 21 was operating and carrying on the business or doing the business of the United Mine Workers, then there would be agency and there would be liability.

We contend that in this case there is ample page 2120 { evidence to show—and we are asking for an instruction on that theory, and that is why I am discussing it now—that this District 50 was an agency, was an arm, was an instrumentality of the international union in carrying on its business of organizing the unorganized outside of the mines. You start with Section 20 of the Constitution. Section of the Constitution of the United Mine Workers of America, which is in evidence here as—

The Court: Don't you think we had better discuss that when we get to that instruction? I am afraid we will go too far afield while we are discussing this instruction.

Mr. Allen: Just as Your Honor suggests.

The Court: Let's defer argument with reference to the constitutional matter until we get to the appropriate instruction.

Mr. Allen: All right. We are talking about the question of previous organization and ratification and agency, aside from what these written documents have to say on the question of agency. So I will leave that out of it.

There isn't any question about the fact that the Kentucky law is clearly laid down in the cases cited in the memorandum for trial filed by Mr. Moore, and I have an additional memorandum also. They lay down the doctrine clearly that if the acts were done within the scope of the employment or in the business of the company, and so forth, no express page 2121 { previous authorization is necessary and no ratification is necessary.

The Court: What about if it was a willful tort?

Mr. Allen: It doesn't make any difference if it is a willful tort. That is all illustrated by some half dozen cases that were brought against the Louisville & Nashville Railroad Company, in which the railroad company was sued for acts of the conductor of the railroad who committed a tort against a pas-

senger. If that tort was committed while he was on duty, so to speak, tending to duties assigned him, then the railroad company was liable not only for compensatory but for punitive damages. That theory, if Your Honor please, is not unusual. For instance, there was a recent case decided by the United States Court of Appeals where a taxi driver got into a fight with a man over the fare and beat him up, and they sued the taxi company and held the taxi company liable for beating just the very stuffing out of that man.

Mr. Robertson: They do it in bus cases all the time.

Mr. Allen: They do it in bus cases. Mr. Robertson knows that.

Mr. Robertson: His Honor knows it, too.

Mr. Allen: I do want to answer Mr. Pollard on one thing that he mentioned. Mr. Pollard referred to the page 2122 $\frac{1}{2}$ allegation in the complaint, that we went further than necessary to allege that there was ratification by these defendants, by the International Union. Mr. Moore has a memorandum on that, but the latest case on that subject is in 189 Virginia at page 200. It went up from Judge Lamb's court. In that case the plaintiff alleged in his notice of motion more than he was required to allege, and Judge Lamb held him to it. The Court of Appeals said, "No, if the attorney who drew the complaint alleged more than he was required to allege, all he is required to do is to prove what makes out a case."

Mr. Robertson: And I claim it is ratified under the law of Kentucky as set out in the trial brief.

Mr. Moore: That is on page 27 of our trial brief.

The Court: I don't think you need to discuss that.

Mr. Allen: All right, sir. I am done.

The Court: Let's go on to the next point in this instruction.

Mr. Robertson: All right, Your Honor. The next sentence: "An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons."

There certainly can't be any question about page 2123 $\frac{1}{2}$ that. It is admitted that William O. Hart and

David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case—"

I talked about that this morning and won't repeat it.

Mr. Pollard: Excuse me, Mr. Robertson. The way we were handling these instructions before the argument started on this question was that we were making our objections.

The Court: I believe you are right, Mr. Pollard.

Mr. Robertson: I said, go ahead. I quit. Mr. Allen has almost talked me into collapse, but I quit.

Mr. Pollard: George, read us another case, will you!

The Court: Go ahead, Mr. Pollard.

Mr. Pollard: Judge, in the second paragraph I think it would confuse the jury if we spelled out the full name each time, and if we limit it in each case where you want to mention one of the unions to say "United Construction Workers," "District 50," or "United Mine Workers," and keep it to those designations for the three unions.

The Court: Is there any objection to that?

Mr. Robertson: Yes, sir. We put it that way because that is the way they have insisted upon it heretofore, and that is the way it is.

Mr. Allen: They say that is the proper and page 2124 } correct designation.

Mr. Robertson: They have held us to account on that in their answers to interrogatories.

Mr. Pollard: We feel that the object of the plaintiff in wording the instruction that way is to give it an opportunity to repeat the words "United Mine Workers of America" in connection with each defendant in an effort to create prejudice and confuse the jury and to think there is more connection than they should think.

Mr. Lowden: That is the name of them, isn't it?

The Court: Let us let Mr. Pollard finish now.

Mr. Pollard: With respect to that one point that is all I have to say on it, sir.

The Court: Let's take the paragraph, if you don't mind, Mr. Pollard, or would you rather dispose of that point first?

Mr. Pollard: If we could dispose of that point that would free my thinking for the rest of the paragraph.

Mr. Robertson: If Your Honor please, we say that they have told us and we stand corrected, that they told us that that was the right way to do it. They have put it that way when they want to get the benefits of it, and we put it that way in the hope that they will get the burden of it, and we have a right to do it. They sing high and sing page 2125 } low, and they have to sing the same way both times.

The Court: I am of the opinion that this is the correct way to state it. Let us go to the next point.

Mr. Pollard: We except to that ruling.

The Court: What is your next point. Mr. Pollard?

Mr. Pollard: Then to take up the next of it, we need a ruling from Your Honor as to whether the statement there

is proper where it says "within the scope of their authority."

The Court: The Court rules that that statement is proper.

Colonel Harris: That is the first paragraph?

The Court: The first paragraph, yes.

Mr. Mullen: We note an exception.

Mr. Pollard: I wonder, to save time, since the reporter is taking everything down, could we make our exception merely by saying we except to your Honor's ruling for the reasons heretofore stated?

The Court: That is satisfactory to the Court.

Mr. Allen: Yes, I think that is proper.

Mr. Pollard: Then we except to Your Honor's ruling for the reasons heretofore stated.

To get back to the first paragraph, we want to make a further exception, and that is, Your Honor having ruled that the rule of *respondere superior* applies rather than the rule of authorization, participation, and ratification, page 2126 } we now think that the rule of *respondere superior* is incorrectly stated in the first paragraph and that the rule properly stated is as follows:

"*John v. Lococo*, 76 S. W. (2d) 897 (1934).

"If the assault of a servant of a third person is done in the execution of the authority given him by the master and for the purpose of performing what he was directed to do, the master is responsible whether the wrong done was occasioned by a wanton, willful purpose, or to accomplish his business in an unlawful manner, but, if the servant commits a wrongful act without authority, and not for the purpose of executing the orders or doing the work of his master, the latter is not responsible therefor. * * *"

Mr. Robertson: Are you going back to the first paragraph?

The Court: Yes, in view of the Court's ruling.

Mr. Pollard: That is the ruling laid down in Kentucky in the case of *John v. Lococo*, in 76 S. W. (2d) 897, and that is the way that rule is correctly stated. We think it is now erroneously stated as long as the Court has ruled that it is going to follow that doctrine of agency.

Mr. Robertson: That is just an additional ground of objection to the ruling of the Court that you are making now.

The Court: What have you gentlemen got to page 2127 } say about the objection?

Mr. Robertson: I don't think we have to say anything on it because the Court has already ruled.

The Court: Do you have anything to say on that point, Mr. Allen?

Mr. Allen: I don't think that Mr. Pollard is correct about that, Your Honor. I think you will find the correct rules stated in a little more detail on page 3 of our Instruction No. 10:

"It is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing the acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done."

That is the exact language of one of the Kentucky cases.

Mr. Robertson: It all comes back to what we have in the trial brief.

page 2128 } Mr. Pollard: I have nothing further to say on that.

The Court: The Court will tentatively overrule your objection.

Mr. Pollard: And we except for the reasons stated.

Mr. Mullen: Is there anything you have to say on the last part of that?

Colonel Harris: I was just checking up with the reporter. You all will recall that I started at the beginning of this instruction and went all the way to the end stating my objections earlier in the day.

The Court: I think you did.

Mr. Pollard: In the third paragraph, Your Honor, attempts to define when a person acts within the scope of his agency. As I understand, the master is liable in Kentucky under the *respondent superior* doctrine when he acts within the scope of his authority, and the master is also liable when he acts outside of the scope of his authority provided the act was motivated by a desire to serve the master and was in fact acting in the master's interest. I don't think that this third paragraph expresses those thoughts.

Mr. Robertson: I think the paragraph is correct as written. It is taken out of a case decided in Alaska last summer.

The Court: Decided where?

Mr. Robertson: In the Federal Court in Alaska.

The Court: We are in Kentucky now.
page 2129 } Mr. Robertson: I stand corrected. I say that
 } accords with the Kentucky law.

Mr. Pollard: May I have the case, Mr. Robertson, on which you are relying for this statement?

Mr. Robertson: You know it.

Mr. Pollard: The Kentucky case on which you are relying for this statement.

Mr. Robertson: It is in the original brief. You asked me a question; let me answer you. If the agent acts within the scope of his authority and the principal acquiesces in it and knows about it afterwards and accepts the benefit of it and does not repudiate it, he is hooked. That is covered in the trial brief.

Mr. Pollard: I asked for the citations.

Mr. Robertson: I refer to the trial brief. That is all I have at the moment. I don't carry them like that, Mr. Pollard.

Mr. Lowden: Page 18 *et seq.* You've got it.

Mr. Robertson: Mr. Allen suggested this. We will eliminate the last two paragraphs of that particular instruction.

The Court: All right.

page 2129-A } (Plaintiff's requested Instruction No. 5 follows:)

"The Court instructs the jury if you believe from the evidence that, during the period in which the acts complained of were committed, United Mine Workers of America, was using District 50, United Mine Workers of America, and United Construction Workers, a division of District 50, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America, is liable for any wrongful acts of the agents and employees of District 50 and United Construction Workers while carrying out the purposes of the agency."

Mr. Robertson: There is one slight correction that ought to be made in No. 5 before it is discussed.

page 2130 } "The Court instructs the jury if you believe
 } from the evidence that"—you see the way it is
 } written now—"during the period in which the acts com-
 } plained of were committed * * *". That assumes they were
 } committed when that is in controversy. So we ought to strike
 } out the words "during the period in which." It should read
 } this way: "The Court instructs the jury if you believe from

the evidence that the acts complained of were committed," then insert "and that during the period in which they were committed." Then the rest of it remains as written.

Mr. Allen: Comma after United Mine Workers of America?

Mr. Pollard: Excuse me, Your Honor. Mr. Robertson jumped over to No. 5 before I was quite finished with my objections to No. 4.

The Court: All right.

Mr. Pollard: That is with respect to the last four lines of the second paragraph. It would seem to make a fairer statement if that clause were rearranged to read as follows: "Whether during that period of time they, within the scope of their agency for United Construction Workers or District 50 or the United Mine Workers or all of them, committed the acts charged against them."

Mr. Robertson: I think it is correctly written, and I submit that we have the right to have our language page 2131 } as submitted.

The Court: Do you gentlemen oppose that change?

Mr. Robertson: Yes, sir.

Mr. Allen: I didn't quite catch the change you are suggesting, Mr. Pollard.

Mr. Pollard: After the word "they", "whether during that period of time they," then put in the clause, "within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them, committed the acts charged against them." It gives it a different meaning, Mr. Robertson.

Mr. Robertson: I don't think it does.

Mr. Pollard: The way it is now stated it presents to the jury an assumption that the acts were committed.

Mr. Robertson: It doesn't at all.

Mr. Pollard: Your Honor, the way it is now written there is an assumption that if acts were committed, they were committed within the scope of their agency.

Mr. Robertson: Not at all.

The Court: It says "whether during that period." I think that is all right as written.

Mr. Pollard: We except.

The Court: Did you get your exception in?

Mr. Pollard: Yes, sir.

Colonel Harris: I have something I want to page 2132 } say about No. 5, if the Court please.

Mr. Robertson: Let me get the wording in that I am offering.

"The Court instructs the jury if you believe from the evidence that the acts complained of were committed and that during the period in which they were committed United Mine Workers of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50—"

Mr. Mullen: We have always spoken of it as a Division of District 50.

Mr. Robertson: You have spoken of it as a division. We had all that out before lunch, Mr. Mullen.

Mr. Pollard: On the last instruction we went into the question of the responsibility of a principal for the acts of its agent, and I assume that question was whether the United Construction Workers were liable for the acts of Hart. This instruction goes into the question of the liability of one union for the acts of another union. We say that the doctrine of *respondet superior* could not possibly apply there. You never have the doctrine of *respondet superior* applying as between two corporations, and they have made out that the union organization, the defendants, are like corporations. With respect to the responsibility of one union as to another union, then of course there must be either authorization or participation or ratification, and that is what this instruction goes into.

The Court: Let me read this.

Mr. Robertson: "The Court instructs the jury if you believe from the evidence that the acts complained of were committed and that during the period in which they were committed United Mine Workers of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of the District 50 and United Construction Workers while carrying out the purposes of the agency."

Colonel Harris: Judge, the thing I think you ought to be considering, too, is those last eight words "while carrying out the purposes of the agency." To me that is a new way of charging *respondet superior*. I have always heard when they act in the line and scope of their employment and in the course of their principal business. Anybody could be carrying out the purposes of agency without sticking within the line and scope of his employment. We are jumping—

Mr. Robertson: Do you want that changed?

Colonel Harris: I say the way you have got it page 2134 } I don't want this charge as written given because it is a new test.

Mr. Robertson: What do you say about the last few words of it?

Mr. Harris: I say the words I have heard are "in the line and scope of their employment and within the course of their principal's business."

Mr. Robertson: How do you suggest that we word it there?

Colonel Harris: I just dictated it to him; "in the line and scope of their employment."

Mr. Robertson: "is liable for any wrongful acts of the agents and employees of District 50 and United Construction Workers while—" What?

Colonel Harris: "—while acting in the line and scope of their employment and within the course of the business of United Mine Workers of America."

Mr. Pollard: I am afraid—

Colonel Harris: You don't want that? I withdraw as draftsman, if the Court please, but as a critic—

Mr. Robertson: We accept that amendment.

The Court: I didn't get it.

Colonel Harris: My associates don't approve, and I didn't want to commit them to something they don't approve of.

The Court: "While acting in the line and scope of their employment," and what else? page 2135 }

Mr. Pollard: I don't see why you couldn't just put a period after United Construction Workers.

Mr. Robertson: Let's finish getting the suggestion of Colonel Harris.

The Court: You are not bound by this suggestion, Colonel, but I want to get this down for the purpose of argument. "Acting in the line and scope of their employment"? What follows that?

Colonel Harris: "and in the course of their principal's business."

Mr. Robertson: I accept that.

The Court: You are offering it that way?

Mr. Robertson: Yes, sir; we offer it that way.

Mr. Lowden: He wants to put a period after United Construction Workers. He wants to say, " * * * United Mine Workers is liable for any wrongful act of the agents and employees of District 50 and United Construction Workers," and put a period. If he wants that, I think we ought to agree to that.

Mr. Robertson: I don't see where he means to put the period.

Mr. Allen: That is all right. Let's do that.

The Court: The Court wants to hear some argument on this.
page 2136 } Mr. Robertson: Either way you want it is all right with us.

Colonel Harris: If the Court pleases, we also object on the additional ground that the defendants are not properly and correctly named and that even now the doctrine of agency is not fully and completely stated as applicable to the facts of this case.

Mr. Robertson: Before we get to that we are entitled to know whether they want it the way Colonel Harris suggested or the way that Mr. Pollard had it, because we want to know whether you do invite it that way or whether you don't.

Colonel Harris: No, I don't invite it either way.

Mr. Robertson: Then I am going to offer it this way. I am going to offer it, then, the way Colonel Harris suggested at first. We offer it that way.

The Court: It is understood, of course, Colonel Harris is not bound by this instruction. He is objecting to the instruction.

Colonel Harris: That is right.

Mr. Robertson: But we offer it in the manner he suggested.

Mr. Pollard: I think before we go any further, Your Honor, there is no sense in working on this instruction unless we first get a ruling from you as to whether you
page 2137 } are going to apply the doctrine of *respondet superior* for acts within the unions, which would make one union liable for the acts of another.

The Court: The Court wants to hear some argument.

Mr. Robertson: Everybody seems to be learning some law here today. I don't know what they mean by trying to make a difference between *respondet superior* and the law of principal and agent. It seems to me it is one and the same thing.

Mr. Allen: No difference.

Mr. Robertson: What you do through somebody else you do for yourself, and you are saying *respondet superior* as if unveiling some other mystery. I understand it is all the same thing.

Mr. Pollard: Your Honor, if Mr. Robertson takes that position, if he will take our instruction on the first page, we will have no further argument.

Mr. Robertson: I am not taking anything. We will meet each one as we come to it. As I say, I don't know what you mean by trying to make a distinction between *respondet superior* and agency.

Mr. Pollard: Your Honor, may I answer Mr. Robertson?

So he will know what I am talking about in the future even if I am wrong.

The Court: Yes.
 page 2138 } Mr. Pollard: When I said *respondent superior* I mean the doctrine which says that a principal is liable for the acts of his agent when the agent is acting within the scope of his authority, or even though he is acting outside the scope of his authority if he is activated by a desire to serve his principal and is in fact acting in the principal's interest. I consider that one doctrine. The other doctrine is that in order for a principal to be liable for the acts of his agent, the acts must be authorized, participated in or ratified. I say that the latter doctrine must apply to make one union liable for the acts of another union because that would certainly apply in the situation of corporations which you all have said applies to unions.

Mr. Robertson: I have no further comment on that, Your Honor.

The Court: I would like to hear you all answer Mr. Pollard.

Mr. Lowden: On what point?

The Court: Whether or not there is any difference between the two.

Mr. Robertson: Your Honor, I will answer it. I will say there is none. I will say they are three parts of one whole. You have the United Construction Workers Division of District 50. You have District 50 which is admittedly a district of United Mine Workers. You have already
 page 2139 } ruled here that the United Mine Workers can act only through its officers and agents. It can make one of its districts agent, it can make one of its divisions of that district its agent. We say that we have evidence here that submits that whole thing to the jury.

Mr. Allen: Now, Mr. Pollard, let's see if I understand you correctly. It is your contention that the ordinary doctrine of *respondent superior* does not apply as between unions, but when you come to the question of whether one union is the agent for another, you have to prove previous express authority or subsequent ratification. Is that your contention?

Mr. Pollard: That is my contention, sir. I base that on the constitution of the United Mine Workers of America, the rules of District 50, and the rules of United Construction Workers.

Mr. Allen: Now let me answer him.

Mr. Lowden: Our theory of it can be very simply illustrated, I think, by the fact that the United Mine Workers of America employed the firm of Williams, Mullen & Hazelgrove,

which is an unincorporated association, called a partnership, but is composed of members, and there you had one association employing another, and the association in Richmond sent an agent up to this court who is not a member of that association but was merely an agent. The United Mine Workers, however, was bound by what he did up here, just as page 2140 } easy as that.

Mr. Pollard: Provided it was authorized.

The Court: He had express authority to appear here.

Mr. Pollard: That is correct.

Mr. Lowden: But the fact that he did not have express authority still would have bound him if he appeared.

Mr. Robertson: I think you have that in Kentucky where you took me a few moments ago, Your Honor. Under the law of Kentucky you do not have to have prior authorization or express ratification. If the United Mine Workers had knowledge of it, and acquiesced in it and accepted the benefits of it and failed to repudiate it, they are bound by it.

Mr. Lowden: You don't need any express authorization, Judge, if a man calls me up and says "I want you to represent me in a case," and I go to court on it, he may not even know I am going, but whatever I do over there binds him. He may have a cause of action against me, but he is still bound just the same.

Mr. Pollard: Judge, no corporation can act for any other corporation and be bound except where the agent is authorized, participated in or ratified. They say the law of corporations applies to unincorporated associations.

Mr. Lowden: We are going to show, and the page 2141 } evidence does show, and the magazine of the United Mine Workers shows clearly what District 50 and United Construction Workers were authorized to do on behalf of the United Mine Workers of America.

Mr. Pollard: If you can convince the jury that the evidence shows authorization, all right.

Mr. Lowden: That is all this instruction asks for.

Mr. Robertson: It is a question of fact to the jury.

Mr. Allen: Let me say a word here before we conclude this. Cases were cited here this morning and the Kentucky statutes were cited to show that in Kentucky labor unions are dealt with just exactly like the corporations are dealt with. Everywhere, so far as I know, one corporation can act as agent for another without any express authorization, and it does it by simply having that corporation act as an instrumentality of the other corporation. I cited a case here the other day which was recently decided over in the federal court, the name of which I cannot recall right now, but I know

that very question came up and the court held that the Virginia corporation was used by the foreign corporation as an instrumentality of agency to carry on its business in Virginia, and no express authorization or subsequent ratification was involved in the case. If you pick up the Va. Digest I dare say you can find any number of cases holding page 2142 } that one corporation may act as agent for another corporation. You just simply use that corporation to tend to your business. You don't have to have any resolution.

Mr. Robertson: I think we met the point when we said we submitted it as an issue of fact to the jury.

Mr. Allen: Wait a minute. I am coming to exactly what their constitution provides. In Section 20 of the constitution of the United Mine Workers, Article 20, Section 1:

"District 50 United Mine Workers of America, subject to the jurisdiction and regulation of the International Executive Board, is hereby created and set up under authority of the International Union and may adopt by-laws and rules not inconsistent with this constitution."

The rules of District 50 in evidence show:

"This organization shall be known as District 50, United Mine Workers of America, and shall work under and subject to the constitution of the International Union as provided in Article 20," which I have just read.

Then Article 3 of the rules of District 50, section 1, provides:

"The administrative officer, operating under the authority of Article 20 of the constitution of the International Union, shall have general and complete supervision over and administration of the affairs of District 50."

The evidence shows that that administrative page 2143 } officer is A. D. Lewis. The evidence shows that he is appointed by John L. Lewis, the president of the United Mine Workers, subject to the approval of the International Executive Board. The evidence further shows that all of the top officers that run District 50 are appointed by John L. Lewis, subject to the International Executive Board.

The authorities all show that it is the power of control that decides the question of agency in a case like this, and the

International Union through Mr. Lewis, with the approval of the International Executive Board, shows that they had the power of control.

Mr. Robertson: It is a question whether he exercised it or not.

Mr. Allen: The evidence shows that they did exercise it.

Mr. Robertson: And that is a jury question.

The Court: Gentlemen, the Court will grant Instruction No. 5.

Mr. Pollard: We except for the reasons stated, and after the recess, Your Honor, we would to take up those last eight words in No. 5. Mr. Robertson, we said that before we could decide on the last eight words we had to have a ruling from the Judge on the question of *respondet superior*.

The Court: Recess, gentlemen, for a few minutes.

page 2144 } (Brief recess.)

The Court: You had a few remarks you wanted to make, Fred. Before you get into that, did you have something you wanted to put in the record?

Mr. Moore: I want to read this into the record to support your contention that a corporation can legally act as an agent, citing 2 American Jurisprudence, page 22, where it is stated under the title "Capacity to Act as Agent."

"It is clear that a person of legal age and of sane mind may act as an agent unless he is laboring under some disqualification from infancy. A corporation may act as agent under the same limitations."

Mr. Pollard: Your Honor, we don't take exception to that. We just say that in order for one union to be liable for another, there must be ratification, participation or authorization.

I would like to clear up one thing. When we say that we take exception for the argument previously stated, we would like to know if it would be satisfactory to have it understood where the same point is raised on another instruction, to avoid going through the complete argument again, we would like to be able to save the point by saying for the argument previously made regardless of which instruction is comes in."

The Court: Is that satisfactory to you gentlemen?

Mr. Robertson: Yes.

page 2145 } Mr. Pollard: With regard to the last eight words, we think that they should be stricken out

and there be substituted in their place the following—

The Court: Which words are you referring to?

Mr. Pollard: The last eight words in the instruction, "while carrying out the purposes of the agency."

Mr. Lowden: It is changed now.

Mr. Robertson: We have adopted Colonel Harris' wording.

Mr. Lowden: "While acting within the line or scope of their employment and during the course of their business with the United Mine Workers of America."

Mr. Pollard: We have now reached an agreement among us and we think that should say: "Provided you shall first have found the acts to be wrongful and District 50 of the United Construction Workers liable for such acts."

Mr. Robertson: You have already ruled on it and we don't think it is necessary to put that in there.

The Court: This is the first I have heard of that. What do you want to add to it?

Mr. Pollard: After United Construction Workers, say "provided you shall have first found the acts to be wrongful and District 50 and United Construction Workers liable therefor."

page 2146 } Mr. Robertson: If Your Honor please, we don't think that is correct for this reason: We put the question right square up to the jury and the Court has ruled on it already. "The court instructs the jury if you believe from the evidence that the acts complained of were committed and that during the period in which they were committed United Mine Workers of America was using District 50 United Mine Workers of America and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business"—If you believe all of that—"then United Mine Workers of America is liable for any wrongful acts of the agents and employees of District 50 and United Construction Workers while acting in the line and scope of their employment and in the course of their principal's business." It is an issue of fact just as much as you can make it.

Mr. Moore: In other words, we say if you find the fact up at the top. There is no reason to put it in again at the bottom as Mr. Pollard suggests.

The Court: They have first to believe that the acts complained of were committed.

Mr. Robertson: That is right.

Mr. Pollard: They have also got to believe, Your Honor,

that District 50 and United Construction Work-
page 2147 } ers are liable for them.

Mr. Robertson: That is what it says. It puts the whole issue up to the jury.

Mr. Pollard: It doesn't say anything about whether the United Construction Workers and District 50 are liable.

Mr. Robertson: It says it just as plain as the English language can say it.

Mr. Pollard: Whereabouts?

Mr. Robertson: "The Court instructs the jury if you believe from the evidence that the acts complained of were committed," then I change it so it wouldn't assume something that is in issue and inserted "if you believe it was committed and during the period * * *" The "if" goes to the whole thing from beginning to end.

Mr. Pollard: I still don't see where you have said in there that you first have to believe that District 50 and the Construction Workers were liable.

Mr. Robertson: If you believe from the evidence that the acts complained of. You don't have to put it in every time.

Mr. Pollard: I just want it in there once. Mr. Robertson.

Mr. Robertson: It is in there. I don't want to argue any more. I think it is in there.

The Court: Do you have any observations?
page 2148 } Mr. Allen: I see what you are talking about,

Mr. Pollard. You think the instruction ought to read so as to put liability on the United Construction Workers and on District 50, and then if the jury believes that United Mine Workers were using District 50, the liability would follow. You want all three of them in there.

Mr. Pollard: I do.

Colonel Harris: If I may make an observation, what Mr. Pollard means is this: That you can't hold a principal liable for the acts of an agent unless the agent is also liable, and that is clear and undisputed law. That is what you are trying to bring out there only you enumerated it.

Mr. Robertson: He hasn't worded it so anybody here can understand him except you.

Mr. Allen: This instruction deals only with the liability of the United Mine Workers, Your Honor. We have other instructions dealing with the liability of District 50. Of course it is true that if the situation is such that the agent isn't liable, the principal wouldn't be liable. Everybody knows that.

Mr. Pollard: This instruction doesn't say so.

Mr. Allen: You want to insert the agent—

Mr. Robertson: I don't think it has to be.

The Court: Why don't you get together on page 2149 } this? I think Mr. Allen is stating something that he feels might be helpful to clear this situation up. Finish your statement, Mr. Allen.

Mr. Allen: Your objection goes to the point that the principal can't be held liable unless the agent is liable. Then you want it stated there so there will be a finding against the agent and the principal, too, as I understand it.

Mr. Pollard: No. So the jury can't find against us unless they find all of that.

Mr. Allen: Sure. The jury can't find against you unless they find against the agent also. That is a perfectly clear proposition. If you want that in there, I don't see any objection to putting it in there.

Mr. Mullen: I think it should be done.

The Court: Suppose you rewrite that instruction overnight.

Mr. Mullen: I think it should be in there.

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page 2158 }

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(Plaintiff's requested Instruction No. 7 follows:)

"The Court instructs the jury that while employees may, free from restraint or coercion by employers of their agents, associate collectively for self-organization, and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare, and may, collectively and individually, strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, neither employees nor associations, organizations nor groups of employees, have the right to resort to violence, intimidation, threats or coercion.

"If you believe from the evidence that William O. Hart, while acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District 50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men, to organize plaintiff's employees, and in furtherance of the business of all three defendants, and by intimidation, threats, acts of violence, or coercion, caused

page 2159 }

plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work, you will find for the plaintiff against all three defendants and assess plaintiff's damages in accordance with the instruction herein on damages."

The Court: All right, gentlemen.

Colonel Harris: May I ask whether that is taken from any case that we failed to find?

Mr. Pollard: Kentucky statute.

Mr. Mullen: The first part of it is taken from the statute.

Colonel Harris: Did you check it with the statute?

Mr. Pollard: It is almost word for word.

Mr. Mullen: It paraphrases the last part of the statute.

Mr. Pollard: It seems to me that their first instruction would now become unnecessary because the first paragraph here states the statute.

The Court: Let's pass over that and take up the next one.

(Discussion off the record.)

Mr. Pollard: Do you insist on your first instruction since this states the statute in the first paragraph?

Mr. Allen: This instruction is an application page 2160 $\frac{1}{2}$ of the Kentucky statute to the facts in this case which we think we have proven. The only thing that is left out in the first part of the instruction is the part of the statute that prohibits an employer from coercion. We are not concerned with that. We are applying the employee part of the statute to the facts in this case.

Mr. Pollard: I understand that, sir, but your first instruction will be the same as the first paragraph of this.

Mr. Robertson: We are perfectly willing to go back to the first instruction as offered, leave the statute out and put the first one in there as written. We went to the other to try to meet their objection. If they make that objection, we go back and offer that at this time.

Mr. Pollard: We are not making an objection. We just asked if you were willing to—

Mr. Robertson: To do what?

Mr. Pollard: To withdraw your first one.

Mr. Robertson: I am willing to withdraw the first instruction and substitute this one for it.

Mr. Pollard: No.

Mr. Mullen: Substitute the one we are reading now?

The Court: No, the one they originally offered, which they agreed to rewrite and quote the full section.

Mr. Robertson: I believe we will do that. We page 2161 } will come back and offer this one as we offered it and then paraphrase the statute here.

Mr. Pollard: To get to Instruction No. 7, in the last line of the first paragraph we object to the use of the word "violence." There is no allegation of violence in the case and therefore it has no place in the instructions.

Mr. Robertson: You have forgotten that they said they got the laborers by the arm and made them sign. You have forgotten that.

Mr. Pollard: There is no allegation of violence in the notice of motion.

Mr. Robertson: I think there is.

Mr. Allen: I think you are wrong there.

Mr. Mullen: I don't think any witness ever testified to that: You testified to it in your opening argument.

Mr. Lowden: Surely witnesses testified.

Mr. Allen: One witness testified that they got one man between two men, got one man right between them and made him sign an application.

Mr. Lowden: It is in there.

The Court: I recall something along that line.

Mr. Lowden: You would like not to have that in there.

Mr. Mullen: You had it in a deposition which page 2162 } you didn't put in, for one thing.

Mr. Robertson: The Hackworth boys, that you boys needled, testified to that. You said they were lying, but that is what they said.

Colonel Harris: We will prove it by Mr. Bryan's testimony when the time comes.

Mr. Mullen: I don't want to argue the facts of the case now. Let's see what the instruction is.

Mr. Pollard: At the top of the second page—

Colonel Harris: Let's don't go to the second page, Fred.

Mr. Pollard: All right, sir. You take over.

Colonel Harris: The paragraph that begins "if you believe," the way that is worded, "if you believe that William O. Hart acting for United Construction Workers," and so forth, "within the scope of his authority." You see that assumes and implies that he was acting within the scope of his authority.

Mr. Robertson: It doesn't do any such thing. It starts out "if you believe." Judge, that is the way all these begin.

Mr. Mullen: "If you believe from the evidence that William O. Hart." Then you inject this sentence simply saying "while acting for."

Mr. Robertson: See if this relieves it. "If page 2163 } you believe from the evidence that William O. Hart was acting for United Construction Workers."

Mr. Allen: "And while so acting." Put it that way if you want to. If you strike out the comma.

Mr. Robertson: Change the "while" to "was."

The Court: "If you believe * * * that William O. Hart was acting for United Construction Workers Division of District 50 * * * within the scope of his authority, and while so acting went * * *"

Mr. Robertson: "While acting within the scope of his authority."

Colonel Harris: I haven't got how you put it down there on the sixth line.

Mr. Moore: "Within the scope of his authority and while so acting went to plaintiff's job site in Breathitt County."

Mr. Harris: I thought Mr. Robertson added something else ahead of "within the scope of his authority."

The Court: What did you add after that, Mr. Robertson?

Mr. Robertson: "Within the scope of his authority and while so acting went to plaintiff's job." You have already written it there.

The Court: I have "and while so acting went to plaintiff's job site in Breathitt County."

page 2164 } Mr. Mullen: There is a further objection. It has been testified that William O. Hart was acting for United Construction Workers and District 50, but it has been denied throughout that he was acting for United Mine Workers of America.

Mr. Robertson: But we are relying on circumstantial evidence there and direct evidence, too; one, the pattern, two, all in the same office, three, that under the laws of Kentucky they were bound to have known about it, they were bound to have acquiesced in it, they have accepted the benefits of it, and they have never repudiated it.

Mr. Mullen: That is your argument. There were no benefits. When it comes to that matter of pattern, when we reach that, I have something to say on that point.

Mr. Robertson: All right.

Mr. Allen: And we are also relying on the agency of District 50 as shown by the written documents and as shown by Mr. Bryan's own testimony in answer to questions which you asked him. He said that District 50 was agent for the United Mine Workers for the purpose of organizing those engaged in industries outside of the mines, and there was no exception to that and no objection to it.

Mr. Mullen: I am talking about the United Mine Workers now, not District 50.

Mr. Allen: If District 50 was the agent of page 2165 } United Mine Workers and William O. Hart was acting as agent for District 50, it comes completely within the line of being authorized to act for the United Mine Workers.

Mr. Mullen: Which brings it right back to the objection Mr. Pollard stated about one organization being agent for another organization without express authority.

Mr. Robertson: I agree with that. That is what the Judge ruled on, that they could be.

Mr. Pollard: Judge, I am worried about the jury's not realizing they must believe all of this. I think it ought to start off "If you believe all of the following from the evidence," and then go on.

The Court: "If you believe from the evidence that William O. Hart was acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District 50 United Mine Workers of America, and for United Mine Workers of America within the scope of his authority—"

Doesn't that mean that the jury has to believe those facts?

Mr. Pollard: Yes, sir.

The Court: "And while so acting—"

Mr. Pollard: It gets a little dubious down there.

The Court: "—went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a dis- page 2166 } orderly crowd of men, to organize plaintiff's employees, and in furtherance of the business of all three defendants, and by intimidation, threats, acts of violence, or coercion, caused Plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work, you will find for the plaintiff against all three defendants and assess plaintiff's damages in accordance with the instruction herein on damages."

Mr. Robertson: I don't object to putting it this way if they want to. I don't think it is necessary: "If you believe from the evidence that William O. Hart was acting for United Construction Workers division of District 50, United Mine Workers of America, and for District 50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, and if you believe that while he was so acting he went—"

I don't think it adds anything to it.

Mr. Pollard: I don't think you ought to put it in just two places and not put it in all.

Mr. Robertson: "And if you believe," after "authority"; "and if you believe while he was so acting he went to the plaintiff's job site in Breathitt County, Kentucky on July 26, 1949, with a disorderly crowd of men, to organize plaintiff's employees, and in furtherance of the business of all three defendants," and if you want to you put it in page 2167 } again, "and if you believe—"

Mr. Pollard: Why not put it just before "in furtherance of the business of all three defendants"?

The Court: Right after "employees"?

Mr. Pollard: Yes, right after that "and".

Mr. Robertson: "And if you believe he was then acting—"

Mr. Harris: Did you all leave out "from the evidence" every time? If you are going to put "if he believes" don't you have to hypothesize that on the evidence?

The Court: Yes, "from the evidence," ought to be in there; "if you believe from the evidence."

Mr. Allen: We will have to write that over again.

The Court: "If you believe from the evidence"

Mr. Allen: "That he was acting in furtherance."

The Court: "Of The business of all three defendants and by intimidation, threats," and so forth.

Mr. Pollard: And insert the same thing at that point.

The Court: "And if you believe from the evidence—"
What goes after that?

Mr. Robertson: "That while he was so acting."

The Court: No, because you have "by intimidation."

Mr. Allen: "If you believe from the evidence that while so acting he by intimidation, threats, acts of violence."

The Court: Is there anything further you page 2168 } want to say?

Mr. Pollard: Yes, sir; at the top of the page, after the word "work" in the middle of the first line I should like to add "and that such acts caused the alleged damages of the plaintiff."

The Court: Wouldn't that naturally follow if they believed that?

Mr. Pollard: No, sir; we are not liable for those acts unless they caused the damage.

Mr. Allen: Where are you suggesting that that go?

Mr. Pollard: After the word "work" at the top of the second page.

Mr. Lowden: But they are going to assess the damages in connection with their instruction on damages.

Mr. Robertson: We can stop right there.

Mr. Pollard: But there is no proximate cause in there.

Colonel Harris: There is another objection that is patent

there. It might cause them to return to work that first day, but if it did not continue on in the other days after the picket sign was put up, then the only thing we would be responsible for would be the damage during that very short interval of time before the picket sign was put up. It not only has to drive them away from the work, but to cause page 2169 } them to stay away.

Mr. Robertson: They can ask for any instruction they want to on this theory of the case. This instruction is based on our theory of the case that they drove us away and kept us away. It is an issue of fact for the jury.

Colonel Harris: That would allow them to recover if, for the sake of argument, we drove them away 20 minutes. That would allow them to recover.

The Court: What would be your objection to adding to the instruction "to refuse to return to work—"

Mr. Allen: Thereafter.

The Court: "—thereafter". How about that?

Mr. Robertson: I don't object to that.

Mr. Pollard: I think they should further find from the evidence, Your Honor, that such acts caused the alleged damage to the plaintiff.

Mr. Allen: The damage instruction deals with that.

Mr. Pollard: No.

Mr. Allen: You can't set out everything in one instruction.

Mr. Pollard: We are not trying to set out everything in one instruction. I just say it has to be the proximate cause of the damage.

Mr. Allen: We don't want to stop at "three defendants,"

Your Honor, if you have that objection.

page 2170 } Mr. Robertson: We have put "If you believe" in there four or five times. We don't care whether we leave it in there about damages or not, either way.

The Court: You have a damage instruction here. Wouldn't that cover it?

Mr. Allen: I would be a little uneasy with an instruction on findings that winds up and doesn't give the jury any idea about how to assess damages unless it does refer to another instruction which gives them such instruction.

The Court: I think that is all right. "And assess damages in accordance with the instruction herein on damages."

Mr. Harris: Instruction herein?

The Court: Yes.

Colonel Harris: There isn't any instruction herein.

The Court: It will be the next instruction.

Colonel Harris: That will be hereafter.

Mr. Allen: It means in the case. Designate it anyway you want to.

The Court: How about "with the instruction on damages"?

Mr. Pollard: "Instructions."

The Court: Do you want to put plural on it?

Mr. Allen: Yes, "instructions on damages."

Mr. Pollard: Your Honor, you have ruled, I take it, that it is not necessary to add in after the word page 2171 } "work" the following, "and if you further believe that such acts caused the alleged damages."

Mr. Robertson: I think I could tell you in two minutes why that is wrong. That turns them out all over the lot, whereas in this other way you say you can't wander around and give damages at large. You have to come back to these other specific instructions.

Mr. Pollard: Yes, but they can't find for the plaintiff unless they believe the damage was caused by the acts.

Mr. Allen: They are told that in the damage instructions.

Mr. Lowden: As a matter of fact, the law of Kentucky is that there may not be any damage proximately caused and they still can recover punitive damages and any such instructions as that would be erroneous.

Mr. Allen: That is right.

The Court: As presently advised I will give the instruction as amended.

Mr. Pollard: We except for the reasons stated in the argument.

Colonel Harris: And for the additional reason that the defendants are not properly named.

Mr. Lowden: Aren't we calling them by their exact name?

Mr. Mullen: You have the correct names in page 2172 } your suit. I think you would be held to the names that you used for them as defendants.

Mr. Allen: If you will just simply agree that we may recover according to our allegations and all, we will be all right. We will shorten the case.

Mr. Mullen: You would have the money in your pocket, wouldn't you?

Mr. Harris: Wouldn't you like for us to be playing bridge and double it for you?

The Court: Instruction No. 8.

Colonel Harris: I would suggest that there has to be some rewriting done. Let's wait and study this No. 8 some more.

The Court: Since they are going to rewrite a couple of

them, it occurs to me that we might study 8 and 9 overnight.

Mr. Allen: And 10.

Mr. Lowden: Why don't you finish that one the same as 7 and then we will have a new subject coming up.

Colonel Harris: I understood the Judge to say when we got started he was going to quit at five o'clock.

The Court: Let me read this instruction first, Colonel.

(Court reading Plaintiff's requested Instruction 8.)

page 2173 } The Court: Let's adjourn until tomorrow morning at nine o'clock.

Mr. Allen: May I make a suggestion for procedure tomorrow which I hope will expedite this matter? I assume that we will take up the balance of our instructions. Let's let all of these gentlemen, Colonel Harris, Mr. Pollard and Mr. Mullen, and Mr. Owens, too, if he wants to, say everything they have to say about the particular instruction we are considering, then let us say what we have got to say and be done and they have a reply.

Mr. Mullen: I think myself that that would get us through quicker. I don't think we ought to be able to talk back and forth.

The Court: I don't think so, either.

Mr. Mullen: I said yesterday we would want to file a motion to strike. I thought I had all the copies here. Bob wrote it up and he is sick. I will bring it up tomorrow morning when I can give you a copy of it and then you can see it.

Mr. Robertson: All right.

(Whereupon, at 5:00 o'clock p. m. the conference was recessed until 9:00 o'clock a. m. the next day.)

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City Hall, Richmond, Virginia
Wednesday, February 14, 1951

Met in chambers, pursuant to recess, at 9:45 o'clock a. m.

Before: Hon. Harold F. Snead.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

A. Hamilton Bryan, President, Laburnum Construction Corporation.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Walter E. Rogers, Counsel for the Defendants.

Also Present: Willard P. Owens.

page 2175 } PROCEEDINGS.

Mr. Robertson: Your Honor, we have written No. 8.

Mr. Mullen: If Your Honor please, before taking the instructions, we wish to present another matter. We wish to move for a mistrial, Your Honor, because of the publication of this article in the News Leader last night. After our evidence was in and before the jury delivered its verdict, it published an inflammatory article against the United Mine Workers and John L. Lewis. The papers are of Bryan Properties, his company. Bryan Properties I think are mutual stockholders. Did Your Honor read the article?

The Court: No, I haven't seen it (handed to the Court).

Mr. Allen: I wonder if for the benefit of all of us you would mind reading it?

The Court: Very well.

"Enemies" of the Miner?

"John L. Lewis, notifying his miners recently of their \$1.60 per day wage increase, included a blunt notice in his announcement: The 425,000 American members of the UMW have been assessed, by vote of the union's executive board, \$20 each, the sum to be collected in four equal installments this month and next. Mr. Lewis made no secret of what he intends to do with the estimated \$8,500,000 from this assessment:

page 2176 } "Expensive litigation is pending and our enemies evidently contemplate additional litigation. * * * We can only judge what is to come by what we are now encountering, and we can expect these attacks from our enemies in the future. * * * (We are) compelled to build up our financial bulwarks to ward off onslaughts from our adversaries * * *

"What we have been waiting for is some reaction—from any direction—to the language of the Lewis letter. Yet no one has been heard to protest, even mildly, this typically Lewisian thunder about *enemies* and *adversaries*, none of whom is identified in the letter.

"There is something almost ominous in that silence. Have we reached the point at which the labeling of one group of

men, by another, as *enemies* no longer disturbs us? Mr. Lewis' language has the ring of a Politburo voice denouncing the 'enemies of democracy.' Economic factionalism in the past decade has become a cancerous disease spreading insidiously, deeper than many persons are aware. There may come a golden age when we all recognize the simple fact that we are each of us in the same boat and will perish or reach shore safely together. Mr. Lewis speaks for those who not only fail to perceive this, but also insist on rocking the boat at a time when all hands are sorely needed at the oars."

Mr. Mullen: If Your Honor please, people were calling me last night to say, "Have you read that article page 2177 } in the paper and what does it mean?" The lawyers who have spoken to me about it have condemned it as the most outrageous article constituting contempt of the Court. It sets forth also financial affairs of the union which Your Honor has ruled it could not do. It makes charges in the last part you read against Mr. Lewis. While Your Honor told the jury not to read accounts of the case, they will read this without realizing that it came under your prohibition. It is highly prejudicial to the case of the defendants, and we think that our motion for mistrial should be sustained. Mr. Bryan is here if you want to find out any interest he may have by reason of ownership in the New Leader or by reason of sharing in a trust in which the stock has been placed. He and his family—Mr. Tenant Bryan is his first cousin, I believe—own the Bryan Properties in Richmond. This is a serious offense.

Mr. Robertson: Are you through?

Mr. Mullen: I am through.

Mr. Pollard: No. I would like to offer as defendants' exhibit No. 71 the editorial page, Richmond News Leader, Tuesday, February 13, 1951, which includes an editorial entitled "Enemies' of the Miner?" Which also shows at the bottom of the paper that David Tenant Bryan is President and Publisher of the Richmond News Leader.

Mr. Lowden: Do you offer this in evidence?

page 2178 } Mr. Pollard: To be marked as Exhibit No. 71.

Mr. Mullen: We offer it on our motion.

(Article referred to was marked Defendants' Exhibit 71 and received in evidence.)

Mr. Robertson: If Your Honor please, of course there is no merit to the motion. I read the article yesterday after-

noon when I went home. I knew nothing of it until its coming out in the paper, and I assume nobody else on our side did, including Mr. Bryan. I don't think that anybody takes the News Leader so seriously as Mr. Mullen seems to contemplate, but I do want to say this, Your Honor: We have talked about a pattern in eastern Kentucky. I want to talk about a pattern in this type of case. I tried a case very much like this one at Luray two years ago. They ran Judge Ford out of the case. They tried to run Judge Crosby out of the case. They tried to run me out of the case. They tried to get a writ of prohibition against Judge Crosby. They made all sorts of motions for mistrial. They made an attack on my personal honesty, and I had to ask the Court to let me go on the stand and testify to what the facts were. The case was taken to the Supreme Court of Virginia and they tried to take it to the Supreme Court of the United States.

Mr. Pollard: May I interrupt, Mr. Robertson, just a moment. Were any of the defendants in this case connected with the case that you were talking about, the Luray case?

Mr. Robertson: I was.

page 2179 } Mr. Pollard: I said were any of the defendants.

Mr. Robertson: You asked me a question. Let me finish it. Until the sheriff and the clerk of the court lied, and the commonwealth's attorney threatened to sue me, and I asked to go on the stand and be permitted to tell my version of the facts under oath and subject to cross-examination, and was permitted to do so. So I am very vitally interested in both cases.

Mr. Pollard: Your Honor, that wasn't the question I asked.

Mr. Robertson: I am coming to this case, Your Honor.

The Court: Let's come to this case.

Mr. Robertson: Now what have they done here? They came along here some days ago and tried to upset this trial after it had been going several weeks on a motion of a number of typewritten pages that were in the vernacular almost entirely baloney. They came along again and said they had another motion here in which they were going to ask for a mistrial earlier this week, and they apparently forgot it because they didn't even present it at the close of all the testimony in the case, they didn't even present it at the beginning of the arguments on instructions here yesterday—

The Court: What about this particular
page 2180 } motion?

Mr. Robertson: I am coming to this one. There is no merit in this one. Here is what makes it self-

evident: If John L. Lewis, who is a national character and who thrives and lives and flourishes on publicity, chooses to sound off for the benefit of the press and then his statements are broadcast throughout this country, if there is any soundness in their motion, John L. Lewis could stop a trial whenever he wanted to by making whatever utterances he chose to make.

Mr. Mullen: Mr. Robertson—

Mr. Robertson: Just a moment, we haven't finished. Some of my colleagues may want to say something.

The Court: You all have everything you want to say, and then I am going to let these gentlemen close, and then I am going to rule.

Mr. Allen: If Your Honor please, of course this was sprung upon us without notice. I read the article last night, but it didn't impress me as being of any great importance and that is the reason I asked Your Honor to read it a moment ago. Being without notice that this motion be made, I can not point specifically to cases which have passed on this question, but Your Honor will remember that the same question came up in bank cases over here in the Federal Court. There was a great long publication in the newspapers much more damaging than that against those men. A motion was page 2181 } made for a mistrial. The district judge overruled the motion and it went up to the circuit court of appeals and they agreed with that also. You remember the same thing happened two or three times up there in the Communist trials in New York. The appellate court ruled on those motions. The sum and substance of all the rulings in cases like this is that in a trial which has attracted public attention like this one has, with national figures involved in the case, it is utterly impossible to keep newspapers from writing editorials and publishing news articles on the subject. If a newspaper contains a news article or writes an editorial which Your Honor thinks is improper, you have the right to issue your rule for contempt, but Your Honor should not penalize us. Not a single attorney knew anything about it, and I conferred with Mr. Bryan and he knew nothing about it.

Furthermore, what is more important in the case, the editorial is in response to a statement that the principal defendant in this case made. I say principal defendant. Mr. Lewis is not personally the defendant in this case, but the union of which he is boss and which he controls is defendant. It is the equivalent of almost a personal suit against Mr. Lewis except that no personal judgment can be rendered against him. He came down here during the progress of the trial. The newspapers published a memorandum of that, published his picture

in the paper. Now he comes and makes this
 page 2182 } statement about collecting money for litigation,
 collecting money for defense purposes, while this
 case is pending in which his union is involved. He couldn't
 expect anything but editorials on the subject. The editorial
 didn't mention this litigation. It didn't mention any specific
 litigation. It didn't mention Mr. Bryan or the Laburnum
 Construction Corporation or anybody else. The editorial
 dealt with the matter as a general news item and as a general
 policy and was writing on the subject generally.

There is not a scintilla of evidence anywhere, and if they
 can produce any, then let them produce it, but until it is pro-
 duced there is no evidence that the editorial was intentional,
 there is no evidence that the editorial was designed to affect
 this case, there is no evidence that Mr. Bryan, the plaintiff, or
 any of the officials of Laburnum knew anything about it or
 had anything to do with it. I submit that the case comes
 right within the confines of the general run of cases like this
 where in every case of great public interest which is given
 notoriety by virtue of the figures involved, like Mr. Lewis, you
 can not prevent newspapers from publishing news items and
 writing editorials generally which anybody may apply to this
 or any other like case.

If Your Honor wants any authority on that subject, I think
 all the authorities were reviewed by Judge
 page 2183 } Parker in that case, and they were reviewed by
 those judges up there in the United States Court
 of Appeals in New York. We have had one or two cases in
 Virginia on the subject, and if Your Honor has any particular
 doubt about this proposition, we want an opportunity to show
 Your Honor what the law is. We believe it is with us. I have
 been trying cases for 40 years and this isn't the first time I
 have had the thing come up like this to contend with.

The Court: Mr. Moore?

Mr. Moore: I have just one more observation. I was im-
 pressed in listening to Your Honor read it by now much of it
 was direct quotes from Mr. Lewis. The whole tenor of their
 argument has been that Mr. Lewis has never heard of the
 Laburnum Corporation and it is such small peanuts. If he
 is going to come out and make a statement like that during
 the trial I can't see any possible reason why we should be
 penalized for it.

Mr. Lowden: One other fact. I think if you go back in
 the last week or so, you will find that this thing that is quoted
 was put out on one of the wire services, either the AP or UP,
 and nobody complained down through the first two para-

graphs when Mr. Lewis said all this. It was obviously designed to publicize the other side of the story, and I think you will find that was carried in the newspapers verbatim. I have read the article before somewhere, if my memory serves me, without any editorial comment.

The Court: Are you gentlemen through?

Mr. Robertson: Yes.

Mr. Mullen: If Your Honor please, this is a matter of protecting the rights of these defendants. The statement that he had made this assessment is a news item and no one paid any attention to it and couldn't take exception to it. You say it in the papers. But that is very different from editorial comment that makes these charges against Mr. Lewis and against the miners. These are serious charges. They are bound to affect it. We would like to have Mr. Bryan put on the stand and ask him what his interest and connection with the News Leader is. This is a very serious matter, not to be lightly put aside. Mr. Robertson has been obsessed with the idea we didn't want to try this case. Your Honor has seen nothing of that. We have always wanted to try it. He is obsessed with the idea that Mr. Lewis wouldn't come here. They summoned him and didn't dare call him. All through we have cooperated. I didn't want to put the case off. I wanted it tried. My instructions were to try it. There is no witness who can make any such statement as that, compared to what may have happened in Luray. We are not charging that these attorneys had this published. Of course I know they didn't. I wouldn't think of making such a charge. But it was done, and the effect is there.

We have a case here on the subject. They say page 2185 } they didn't notice. I didn't know it until last night. I didn't have time to give any notice.

As to Mr. Robertson's talking about renewing the motion for mistrial, we decided not to do it. We had a right to decide not to do it. It was a motion to strike that we had. A motion to strike is more properly a motion to set aside the verdict. For that reason we decided not to do that because it wasn't our practice.

As for the other notice of motion for mistrial, it was done to stop Mr. Robertson from making side remarks. If Mr. Robertson wants to know what it was done for, that is what it was done for. It had a little effect for a while. It didn't have very long. He continued to make side remarks.

Mr. Robertson: I had to reply to yours.

Mr. Mullen: It was done for that purpose rather than as anything against Mr. Robertson himself.

I think Mr. Bryan ought to be asked about this.

Mr. Robertson: I think it all depends on what the Court wants to do. I don't know about Mr. Bryan's connection with the News Leader.

The Court: I don't think the Court will require him to answer what his interests are but you might ask him if he has any interest in the Richmond Newspapers.

Mr. Mullen: Mr. Bryan, have you any interest either through stock ownership or beneficiary trusts in the Richmond Newspapers, Inc., or the News Leader?

Mr. Bryan: I have a small minority stock interest in Richmond Newspapers, Inc.

Mr. Mullen: Has your family an interest in it?

Mr. Bryan: Yes, my mother, brothers and sisters, have similar interests.

Mr. Mullen: The publisher of the paper is your first cousin?

Mr. Bryan: That is right.

Mr. Mullen: Do any of them have an interest in Laburnum?

Mr. Bryan: Tenant Bryan does not.

Mr. Mullen: Who?

Mr. Bryan: Tenant Bryan does not.

Mr. Mullen: Do members of your family having an interest in the News Leader also have an interest in Laburnum Construction Corporation?

Mr. Bryan: Stewart Bryan, Jr., does and Tommy Bryan.

Mr. Mullen: They also have an interest in the News Leader or Richmond Newspapers stock?

Mr. Bryan: None of us have any more to do with what is written in that paper than you do or Judge Snead does.

Mr. Mullen: Mr. Bryan, I am not charging that you had this written.

page 2187 } Mr. Bryan: I don't know any more about it than you do.

Mr. Mullen: It was just somebody in the paper, but the responsibility is there still in connection with this item.

Mr. Pollard: Judge, we are going to point out also that the increase paid by the Mine Workers and the letter spoken of in the editorial all came about prior to the commencement of the trial of this case, which was over three weeks ago, and it is most singular that the owners of the paper would wait until the evidence has been taken and the jury is getting ready to be charged before they write an editorial about it.

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The Court: Our understanding is that we are going to operate on that rule today, giving each side a fair opportunity to express themselves and then the Court is going to rule.

Gentlemen, the Court overrules the motion, and if the verdict goes against you, you may renew your motion at the end of the trial and the Court will take the matter under further consideration.

Mr. Mullen: We except.

Mr. Allen: Do you think it wise to inquire of the jurors if they read the editorial and if they did, then instruct them to disregard it or ask them if they can try the case without prejudice or bias irrespective of having read the editorial?

I think it would probably be proper to do that page 2190 } and give them an instruction that they must disregard it.

The Court: If you gentlemen will prepare such an instruction, the Court will consider it.

All right, gentlemen.

Mr. Pollard: We except to Your Honor's ruling.

The Court: An exception is noted.

Mr. Robertson: Mr. Mullen, we have rewritten No. 8 of our instructions and we have distributed copies of it.

Mr. Mullen: There was another one that we had not disposed of.

Mr. Pollard: Your Honor, I wonder if we might turn to No. 7 just for one second.

The Court: Mr. Pollard, we are coming back to those. Let's go on through and then come back to those which are rewritten.

Mr. Mullen: Yes. I never stated my objection to that.

Mr. Allen: We are going to withdraw No. 6. No. 5 was rewritten.

The Court: Yes, you withdrew No. 6.

Mr. Pollard: Temporarily or permanently?

Mr. Allen: Permanently.

Mr. Mullen: Now we are on No. 8. page 2191 } Mr. Lowden: No. 8 has been rewritten since yesterday. I don't know whether you got a copy or not. We gave you four.

(Plaintiff's requested Instruction No. 8 follows:)

"The Court instructs the jury if you believe from the evidence (1) that William O. Hart was acting for all the defendants for the purpose of 'organizing the unorganized,' and (2) that in furtherance of that purpose he was going

about Eastern Kentucky leading men to various job sites for the purpose of compelling by intimidation, coercion or force the workers on such jobs to join one of the Defendant unions, or failing that, to stop the jobs, and (3) that such activities of Hart were known or reasonably should have been known to the Defendants, and (4) that in furtherance of this design Hart led men to Plaintiff's job site in Breathitt County for the purpose of compelling the employees of Plaintiff to join one of the Defendant unions, irrespective of such employees' wishes, and (5) that Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of Plaintiff to 'sign up' with one of the Defendant unions, and forced others to quit work, and (6) that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of Plaintiff, and with the express and avowed purpose of 'taking over' Plaintiff's job or forcing page 2192 } Plaintiff to get out of the territory, then Defendants are liable to Plaintiff not only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court."

The Court: All right, I am going to tear up this old No. 8 so it won't get mixed up in the papers.

Mr. Pollard: Your Honor, the first objection we will make to this instruction is that this, being a finding instruction, there must be at the end after (6) a further instruction to the jury that they must believe that this is the sole cause of the plaintiff's injuries, because a finding instruction is one which covers all possible theories of the case, and if they are going to find on this instruction alone, then they must also believe that these acts, if they believe them, were the sole cause of injury.

I don't know whether Your Honor wants to take these points one by one or whether you want to hear all of our objections.

The Court: I suspect it would be better to hear all of them and let them answer them and then you reply. I believe that will save time.

Mr. Pollard: That is our first objection.

The Court: You gentlemen might make a page 2193 } memorandum of these objections.

Mr. Pollard: Coming down from the top, Item No. (2), we object to that for two reasons, first, that this charge is not supported by the evidence and, second, that such

evidence should not properly be before the jury. I would like Mr. Rogers to discuss the point of whether or not the jury can properly consider evidence of other acts of the defendant, that is, a course of action.

Mr. Rogers: The second article of this instruction is framed to refer to the possible activities of Hart in going to various job sites throughout Eastern Kentucky for the purpose of compelling by intimidation, coercion or force, the workers on such jobs to join one of the defendant unions or, failing that, to stop the jobs. As I understand it, evidence of activities in connection with other jobs was offered in evidence but was excluded by the Court.

Mr. Pollard: Excuse me, Walter.

The Court: I think it was admitted, wasn't it?

Mr. Pollard: It was admitted, but we say that doesn't prove it. But go ahead.

Mr. Rogers: The evidence of what this individual might or might not have done on other occasions unrelated to the particular job in question here is not evidence that the jury should consider in determining whether or not such acts were committed on this occasion. It is the generally accepted principle that you can not prove the particular charge directed here by proving that there was any habit or that he had committed acts of similar nature to that charged here on other occasions. Otherwise, a man would be convicted of doing an act here because he may or may not have done it on some other occasion. The question is what did he do in this instance. The fact that he may or may not have had such a purpose at other jobs is not a matter to be considered here. Certainly it is not a matter to be commented upon in an instruction directed to the jury. There are some exceptions to the general rule that other acts are inadmissible in a case. They are admissible for certain purposes, but certainly limited purposes. If they are admissible at all, it is merely evidence to deal with the situation in hand and certainly should not be commented upon in a particular instruction, because the question before the jury here is what was done in connection with the work being done by Laburnum Construction Company. Whether or not he did it to somebody else or on other occasions if under any circumstances prior acts were properly admissible as an exception to the general rule, it then becomes simply a matter of evidence, not a fact in issue in this case, but simply a matter of evidence coming within one of the exceptions, and that would reduce it to a matter of evidence, a specific item of evidence that possi-

bly could be considered under some circumstances, but which should not be commented upon or called attention to in an instruction, as this does. It is particularly objectionable when embodied within instructions which go to the jury in a consideration of the question of whether or not the acts were committed here.

Mr. Pollard: Do you want to cite any authorities?

Mr. Rogers: It is a generally accepted principle quoted by numerous Virginia authorities, both in civil cases and in criminal cases, and to some extent the nature of the offense charged here partakes of a wrong. The rule in criminal cases is particularly applicable, that proof of prior conduct, actions taken in other cases can not be used to show that the man did the offense charged in the particular case at hand. Virginia authorities are: *Turpin v. Branaman*, 180 Va. 818, *Radford v. Calhoun*, 165 Va. 24, and *Barber v. Commonwealth*, 182 V. 858, which was a very recent criminal case which went into an extensive review of the question of whether or not other acts could be shown at all or not. It was held in that case, which was a rape case, that his conduct on previous occasions with other complainants could not be shown at all. Other cases that have been cited are civil cases, some of them negligence cases and things of that sort. The principle is so well established that you can't convict a person of the particular charge made here by showing that he committed similar offenses on prior occasions that it hardly needs citation or explicit authority for that. It is a general rule stated in American Jurisprudence on evidence, Sections 302 and following, and the whole principle of the exception as to when they are admissible is dealt with there as well as in *Michie's Jurisprudence on evidence* in Volume 7 at page 383 and following.

When they are admissible it is simply a matter of evidence sometimes to show knowledge or that there is a series of acts directed against one person to show a particular design to do him injury, but then they become only matters of evidence tending to support the charge in question. The fact that they may have been done does not as a matter of law go to establish the liability or the responsibility for the act in question. It can only be considered as tending to prove knowledge of the particular fact involved and then it becomes just a specific item of evidence which should be commented upon in an instruction as a particular matter that can be considered by the jury.

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Mr. Rogers: It might be stated somewhat this way: The responsibility of this defendant in this case to this plaintiff cannot be increased or decreased by what he did to somebody else. This plaintiff would not be entitled to recover anything for what this defendant may have done to me, say, and certainly nothing in an instruction that is telling page 2198 } them what they can find for the plaintiff should refer in any way to what has been done to others.

Mr. Mullen: This takes in the whole of Eastern Kentucky. As I said, they referred to a couple of instances. They referred to two of them by saying there was trouble at such and such a place. They used "drive off" when the whole purpose of a strike is to close down. Everybody knows what a strike is for, to close down, to shut down, not to drive off. In this particular case the plaintiff's own testimony showed that it didn't want to drive them off because on August first he admits Hart said "If you recognize these common laborers, these 15 laborers, you can go on back to work." So it wasn't the purpose to drive them off and it wasn't the purpose to destroy the business. They didn't want to destroy their own jobs.

That is on (2). Is there anything more you want on No. (2)?

Mr. Pollard: Do you have anything you want to add on that, Colonel?

Colonel Harris: Yes, I have.

If Your Honor will look at the instruction it says, "He was going about Eastern Kentucky leading men to various job sites for the purpose of compelling by intimidation, coercion or force * * *". There is not a word of testimony in this case that any intimidation was ever used. One man page 2199 } testified that at one job 2 or 3 hundred men came up, but he did not say that any threats were made. he did not say how many men were working on that particular job. There is no evidence in this case of any form of coercion. One man testified that they came to a job and demanded that they have it. A demand is not coercion. There is no evidence that force was used in any other labor dispute in Kentucky. There is no evidence that anybody was beaten, no evidence that anybody was slashed with a knife or shot at with a pistol. This instruction is grossly misleading and is abstract. It does not apply to the facts of this particular case.

Is it your Honor's idea to go on with (3), (4), (5), and (6)?
The Court: Yes.

Colonel Harris: Then in (3), the last clause of (3) is, "Or reasonably should have been known to the defendants." Counsel have cited no case adding that as a principle of agency, and the only responsibility is on principles of agency for this man. It does not take into account any action taken by the defendants. If they had known of such facts, it doesn't hypothesize anything of that sort.

On (4) it adds the phrase "irrespective of such employees' wishes." The undisputed evidence shows that laborers did sign up. This case is very singular in that they did not put on a single one of those laborers who signed up page 2200 } to show what that man wished, and the only way you can prove what a man wished, what his mental operations were, would be to put that man on the stand and prove it by him.

Then in (5) it says "that Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force—"

There isn't any evidence whatsoever that he was backed up by overwhelming force, that is, no credible evidence, if the Court pleases, because I don't think this court should be misled by something that was palpably a gross exaggeration. The testimony was that there were from 30 to 50 men in the party. Other men testified that it was 50 to 75. One wild man testified there were 150. If there were 30 to 50, there were that many men working on the job for the Laburnum Construction Company. It isn't overwhelming force when the number of visitors is less than the number of workers.

Now take (6). It says, "that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of plaintiff." The plaintiff would not be entitled to any punitive damages on account of Hart's attitude toward the employees. It would have to be Hart's attitude toward the plaintiff. Furthermore, (6) does not hypothesize the law authorizing the award of punitive damages in the State of Kentucky. This is a relaxation of the Kentucky law as to what must be proven in order to justify the award of punitive damages and would make it much easier for the plaintiff to get a verdict for punitive damages than the Kentucky law would allow him to do.

Was there some suggestion you had there, Mr. Owens?

(Counsel conferring.)

Colonel Harris: It has been suggested that I call to the attention of the Court that (6) is in the alternative, and that is "with the express and avowed purpose of 'taking over plaintiff's job or forcing plaintiff to get out of the territory.'"

I don't recall any evidence that anybody was trying to drive the plaintiff out of the territory, and to come to a job in a labor dispute for the purpose of taking over the job does not authorize the award of punitive damages.

We also submit that these various instructions as worded do not meet the requirements of the law so as to authorize the award of compensatory damages and the total effect of this charge taken as a whole is practically to direct a verdict for the plaintiff.

That is all I have to say.

Mr. Pollard: There is one other thing, Your Honor. (4) starts off that "in furtherance of this design". That is the first time design has been mentioned, and it creates the presumption that they have found there is a design page 2202 } when design hasn't been previously mentioned.

Following No. (6) starting "then defendants are liable to plaintiff not only for all damages proximately resulting from such action, but also punitive damages—"

The law is not that the defendant is liable for punitive damages, but it is that the jury may in its discretion award punitive damages, which is an entirely different thing. This amounts to an instruction that they must find punitive damages.

Mr. Mullen: Finished?

Mr. Pollard: Yes.

Mr. Mullen: If Your Honor please, I would like to comment on a few of these. I am going down to (5) now where he uses "backed up by overwhelming force." The testimony is that they had 64 people on the job on the 26th. That is Mr. Bryan's testimony, and it is in evidence. Henry Starr said there were between 50 and 75 people. Bert Preston said there were 40. The Hackworth Brothers, whose stories were remarkably alike in all respects, John said 35 to 50, Norman 35 to 40, Robert 30 to 40. The only man who put it up higher was that man Chester Trimble, and nobody agreed with him. Paris Trimble said 60 men. Hart testified he had between 20 and 30 men. Lee Bach said 20 to 25 men. Burl King 20 to 30 men. Haslam, the superintendent of the mines there, said it was between 25 and 30 men.

page 2203 } There is no evidence there of overwhelming force. On the contrary, the men brought there

were less than the number of the employees working there. There is no basis to say that they came there backed up by overwhelming force.

On (6) there is no proper basis for saying they came "with the express and avowed purpose of 'taking over' plaintiff's job" in the face of the plaintiff's own testimony that on August first Mr. Hart said, "If you recognize the laborers, go ahead with the work," and also the testimony throughout that they only wanted to take over the laborers. Even Plaintiff's witnesses deny it, they let slip a word here and there showing that they were laborers. Mr. Bryan immediately recognized it was a question of laborers. He phoned trying to get the laborers in the other union. All of the testimony that they tried to bring out, they say that one man was a laborer that they were trying to force to sign. Mr. Bert Preston recognized that they were after the laborers. You can go through their evidence and find out that those who said they were after all of them let slip a word here and there that they knew it was the laborers they knew they were after. There is no basis for saying "with the express and avowed purpose of 'taking over' the plaintiff's job," in the face of the plaintiff's own testimony to the contrary.

The Court: Are you gentlemen through?

Mr. Pollard: Yes.

page 2204 } Mr. Mullen: Yes, we are through.

The Court: All right.

Mr. Robertson: I am going to ask Mr. Lowden to lead off for us, Your Honor.

Mr. Lowden: I think, first of all, if Your Honor noticed the way this thing is drawn, the jury must find all of these matters as facts. I drew it, and my idea was to stay well within what we are entitled to ask for. Therefore, as in the instructions as to agency, in this instruction they must find more than is necessary.

When you come down to the remarks of Mr. Rogers with respect to finding No. (2) he said that in a criminal case—and I agree with him—the matter of how fast I was driving this morning has nothing to do with how fast I am going when the cop pinches me on the way home tonight. I agree with that. The finding No. (2) that we are asking them to make hasn't anything to do with what they did on this particular job. The fact of what he did goes to two other points, which I think are significant. First, it has a bearing on the question of agency. I think Mr. Rogers said for that purpose other occasions are permissible. Secondly, in this case we are asking for punitive damages, and it seems to me that if the finding No. (2) is made coupled with some of the other

findings which they must also make, they will have them found
malice and express design to go around the coun-
page 2205 } try not only for us but for everyone else and run
them off the job.

Now, we come down to the question of whether or not there was overwhelming force. The testimony of our witnesses, if you believe them, was that they were outnumbered 3 to 1, 4 to 1, 5 to 1, 6 to 1. It may be that we had 65 people on the job, but 8 of them were over at the schoolhouse, another group were at the tipple, and another bunch were up on the hill three miles away, which you could get to only by going around the mountain. If there were 65 altogether and they were all together at the same time, maybe there wouldn't have been overwhelming force, but Mr. Hart testified, and if you look at the record this is true, that when he came to the schoolhouse he had 25 to 30 men, 25 to 30 against 8. He admitted that, but he never denied that he had more than that. Never did he testify that that was the number that he took to the tipple. Our evidence is that there was a different number of people at the tipple than there was at the schoolhouse. Mr. Hart didn't deny that because he only testified—and I think I am correct on this—that when he had 25 or 30 men that was at the schoolhouse only, and he very carefully didn't say how many he had at the tipple.

So if you believe our people—and I think it is almost admitted by them—certainly at the schoolhouse they did have them three or four to one. Contrary to what
page 2206 } Mr. Harris said, there is plenty of evidence to support that statement.

There was some statement made by Mr. Pollard that the last part of the thing required them to find punitive damages. It was written with the intent, and I think it expresses it, that they may find punitive damages if they find all those facts, and they may not, but there is another instruction telling them what they may do about that. It doesn't require and was not intended to require the Court to tell them to award punitive damages.

There was something said that there was no evidence that Mr. Hart came there with the express purpose of either taking over the job, not in those words, or running Mr. Bryan out of the territory. If you believe Mr. Bryan, that is what he expressly said he was going to do, and that is exactly what he did do. Hart denies that. But the Court is not instructing the jury that that is the fact. It is asking them if they believe it; it is asking them, "Do you believe Mr. Bryan or do you believe Mr. Hart?" If they believe Mr. Hart, then that paragraph would fail and the answer would be "No."

I think this particular instruction was drawn with the purpose in mind to make the jury find more than it is then necessary for them to find in order to give us both compensatory and punitive damages if they find all that. I page 2207 } agree that some of the points are in issue. All we are doing is asking them if they believe this. If they don't, then under this instruction they couldn't find for us. But I don't see in there any place where it is unfair or any place where it is not supported by what I consider to be proper evidence. Of course if I didn't think the things we were asking were all going to be answered "yes" on the basis of the evidence, I wouldn't have drawn this instruction. That is all I have to say.

Mr. Robertson: All right, Mr. Moore.

Mr. Moore: I would like to make one comment on Colonel Harris' remark about the words "utter disregard for the rights of the plaintiff," not being sufficient to meet the Kentucky law on punitive damages. Those words are almost identical to an instruction given in a Kentucky case, *Kentucky Heating Co. v. Hood*, 118 S. W. 337, where the Court in stating the instruction on punitive damages stated it as follows:

"I further instruct you gentlemen that if you believe from the evidence that the agents or employees of the Kentucky Heating Company, the defendant, maliciously or in wanton disregard of the plaintiff's right—" and so forth, then enumerating the points charged against them. There it is a "wanton disregard," and here we say "utter disregard." I think we would change "utter" to "wanton" if they want to go that far. I think it is exactly right under the page 2208 } Kentucky law.

The part about the pattern in addition to the elements of malice and agency, which Mr. Lowden has discussed, we believe is shown in our trial brief, the same authorities that Mr. Rogers cited in *American Jurisprudence* and *Michie's Jurisprudence*.

Mr. Allen: May it please your Honor, from a practical point of view what they are saying is that there is not sufficient evidence in the record upon which to base this instruction, that is, not sufficient competent evidence. Mr. Rogers admits that there is evidence in the record, but he contends that some of the evidence on which it is based is incompetent.

Colonel Harris' argument is addressed to the point that there is not sufficient evidence in the record about these other instances and according to Mr. Rogers, if there were, the evidence is inadmissible. I am not going to say much about

the admissibility of it because I consider that Your Honor has passed on that. I am coming to it in just a moment.

But as to whether there is evidence in the record of these other instances, I rather suspected something like this would come up, and I went through their own records on the subject. Mind you, our testimony shows that Mr. Bryan stated that Hart told him that he had closed down people at Beckett Construction Company and Link-Belt Construction Company and the Rust Engineer Company. Nelson Baldrige testified with reference to the instance at Wheelwright. Some of these instances are mentioned in their written reports which are in evidence, and here is what some of those reports show.

They show in the answer to Interrogatories (2), question 27, 4.9, that the job at R. H. Hamill Company was closed down at Ragland, Kentucky. That report shows that they had been working an A. F. of L. labor crew, and when they forced those people to sign, then the job was resumed. The same interrogatory, sub-answer 4.20 refers to closing down the job of Livingstone Construction Company at Toner, Kentucky. That report shows that they refused to recognize the defendants' unions and that they closed the job down.

The same report, 4.28, shows that the Associated Construction Company at Jeff, Kentucky—I forget the name of the president of that company—objected to signing with the United Construction Workers because his sub-contractors were A. F. of L. laborers, and he didn't think that the A. F. of L. and these people could get along together, so he refused. The report goes on to say that they gave him a week to think it over, and it added, "I intend to close the job at Jeff." That is Hunter.

Those same reports showed that they closed down the job of Charles Brothers Lumber Company at Big Creek, Kentucky, because they had failed there to recognize these defendants' unions. They say in that report that they closed the job down.

Mr. Pollard: Your Honor, may I ask Mr. Allen a question?

Mr. Lowden: We didn't bother you.

Mr. Pollard: I am asking the Court if I may do so.

The Court: I suspect it would be better, Mr. Pollard, to make a memorandum of it and then when he gets through ask him the question.

Mr. Allen: Ask me when I get through. I will not take long. I don't want to cut you off but I will answer.

What is worse, in that same interrogatories, in sub-answer 4.22 there is a report in the exact language: "We were un-

able to get the job until Fleming"—who was one of their representatives—"whipped the bully on the job." That is in their written report.

Then you come right back to the issue in the case as to whether Hart went to the job site in this instance with the very peaceful intention of just by persuasion talking to these people and persuading them to join his unions, or whether he went therewith the intention that we say he went there with.

All of the law on the subject is to the effect that page 2211 } when a matter of intention, plan, program, or pattern is involved, you can go into these other instances. I don't think it is necessary for me to read the paragraph that I read from Wignore the other day but if Your Honor wants your mind refreshed, I will read it. It is in your trial brief there also.

You will remember that Frank Dixon, the International representative in that section for the A. F. of L., testified that that was the policy of these people. He was in position to know. He was dealing with them. He was locking horns with them all the time. He said it was their policy to run A. F. of L. men off the job and force people to sign contracts.

You come to the latter part of the instruction and they criticize it because it winds up by saying the "defendants are liable to plaintiff not only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court."

Punitive and compensatory damages are defined and exactly the circumstances under which each may be awarded are stated clearly to the jury. That is the reason why I insisted this instruction not close without a reference to the others, else you would have to repeat the whole definition of compensatory and punitive damages in every instruction.

If you want to ask me a question, Mr. Pollard, page 2212 } I will be glad to answer you.

Mr. Pollard: I just wanted to ask you if any of the reports which you referred to in the interrogatories showed that these jobs were shut down or were organized, the reports that you referred to, and if there is anything in the reports that shows intimidation, coercion, force or violence.

Mr. Allen: There is nothing in the reports to show expressly whether the job was shut down as a result of a strike or whether it was shut down by force or violence, except that report there which says that one of the representatives of the defendant union went there and whipped the bully on the job and then they got a contract.

Mr. Mullen even asked some of your witnesses what they

meant by closing down, and they said they meant by closing down, as the result of a strike. They have answered the interrogatories in this case, and the specific question was asked them as to whether there was a strike and the answer in the interrogatories was that there was no strike on this job.

Mr. Mullen: There is no such thing as this in there.

Mr. Allen: All right, I will show it to you.

Mr. Robertson: We are getting away from the procedure that we were going to follow.

The Court: I think counsel can ask a question of other counsel.

page 2213 } Mr. Allen: He said I was wrong about that.

I will show it to him. Look at Interrogatories (2), question 56, to the UCW. It is right in there.

The Court: Let's recess for five minutes, gentlemen.

(Brief recess.)

Mr. Allen: What was that question you asked, Mr. Pollard?

Mr. Pollard: Mr. Mullen asked the question.

Mr. Mullen: The question was whether there is anything in the record saying on our part that there was no strike.

Mr. Allen: Yes. Read the question there. Do you have it, Mr. Robertson? I will read the answer. It is question 56.

Mr. Robertson: Interrogatories (2), Question 56:

"When and upon whose authority did United Construction Workers local Union 778-A decide to take strike action against the plaintiff in connection with the plaintiff's work at Breathitt County, Kentucky? Was the so-called strike against plaintiff that took place at Breathitt County, Kentucky on July 26, 1949, sanctioned by the National Director of United Construction Workers or his designated representative and if so, when and by whom was such action given?"

page 2214 } Mr. Allen: "Answer: No formal strike action was ever taken by Local Union 778-A and consequently there was no occasion for nor was any request made to sanction any strike action."

Mr. Mullen: No. The individual members of the laborers struck. I knew it didn't say that.

Mr. Allen: I don't think, Your Honor, that a discussion of that is material to what we are discussing here now. I am not accepting my good friend Mr. Mullen's statement about that in view of the evidence in this case, but I don't see where we should at this time go into a discussion of that in

view of the admissibility of the evidence upon which this instruction is based and the sufficiency of the evidence before the jury as a basis for the granting of that instruction.

I will be through in just a moment.

You remember that Hart testified that while some *cuss* words were used there, everybody was laughing and Hart admitted he did mention bringing 300 men there, but he said that was all just a laughing matter and a joke. You remember the testimony in the record to the effect that Mr. Bryan's men would be afraid to work and that if some of them should undertake to work he would have enough men there to stop them. He mentioned also to Mr. Bryan that he had run other people off the job and he saw no reason why Mr. Bryan should complain, that his company wasn't in any different position

from the others. He told Mr. Bryan over the page 2215 } phone on July 14 that if he did not recognize his union, he would close down the job, just like he had closed down jobs of Link-Belt Company and Beckett Construction Company and the Rust Engineering Company at Wheelwright, West Virginia. Nelson Baldrige testified to the same effect, and furthermore several witnesses testified that the reputation of these defendants for running people off the job unless they employed their men was bad, their reputation in Kentucky. If I am not mistaken, Frank Dixon testified to that, but I know Frank Dixon testified that to his knowledge it was their policy to do it. That is all before the jury.

That goes to the question of intent and motive and purpose for which Hart went to this place on July 26.

I think that is all I have to say.

Mr. Robertson: Judge, I will take just a minute. I want to point it up a little bit on the facts.

Since I had to prepare myself to examine these witnesses I ought to remember the evidence pretty vividly. In the first place, this whole instruction is predicated on a finding of fact by the jury, if you believe so and so. All those six elements are in the conjunctive. In other words, if they fall down on any one of them, the jury cannot find under this instruction. As Mr. Lowden has said, it was drawn that way purposely to play safe.

Take No. (1), organizing the unorganized. page 2216 } There is no use going into that. That was the purpose of all three defendants.

That he was going about Eastern Kentucky. You remember the first day he called Bryan on the telephone on the 14th and said, "It is in our territory. If you don't recognize us and don't use our men, we are going to run you out of East-

ern Kentucky just like we have done so and so." You remember when Bryan telephoned him from the service station in Huntington, and couldn't get Hart but got David Hunter and he said he would get the message but it was too late, that they had already gone. He got them down at the railroad crossing on the afternoon of the 26th and said he would bet him \$500 he would never quit, and he said, "Nobody has ever been able to buck the United Mine Workers yet, and you can't either."

It was said here about Dixon and all these others about their going around Kentucky. It shows the pattern of what they were doing.

As to whether they were known—and all this is an issue of fact—whether they were known or should have been known to the defendants in view of the set-up out there in Pikeville and Tom Raney out in Pikeville, it comes back to the fact that they have accepted the benefits of it, they have never repudiated it, and it was in furtherance of their purposes.

The Court: Let me interrupt you. Go on and page 2217 } finish and then I will ask you this question.

Mr. Robertson: I don't think it is necessary to say anything more about the force except that they had a hall full of men here, and after they put on two or three of them they quit. They put on one fellow who said that he was at the union meeting and the men were scared to go back. The most vivid one they put on was that red-headed fellow that was working on the high line named McClellan. They asked him was anybody scared and he said "Sh-h! trouble, trouble." They were going to bring 500 people from Beaver Creek. That is in evidence.

The evidence is just shot through with evidence to that effect. The whole issue is put up as an issue of fact to the jury, all six of them in the cumulative.

The Court: What about No. (3), "that such activities of Hart were known or reasonably should have been known to the defendants"?

Mr. Robertson: Here is our theory on that, Your Honor. You can even go further back if you want to than that. Fohl, whose wife is a niece of John L. Lewis, got on Laburnum's trail, working through David Hunter over in Hopewell. They said that job was about finished, that wasn't big enough potatoes, so they let that wither on the vine. Then when they got out to Kentucky and this fellow down at the
page 2218 } Codell company wrote that letter to Tom Raney and that got to David Hunter, then they started going into action. I say it is a fair issue to submit to the jury in view of this background with Fohl here in Richmond

and in Hopewell. Then in view of the fact that you have Tom Rancy out at Pikeville, who says that he is hired and fired by John L. Lewis and is responsible to John L. Lewis, and what else does it say? All about the office lay-out there. There is no use going into that. They say all about the post office boxes and the telephones. We don't have to talk about that. That was just utterly amazing to me when he testified to this. He said, "I help David Hunter whenever and wherever I can. He calls on me to help him and for advice and guidance whenever he wants to. He is in and out of my office when I am in town several times a week. Whenever he wants me to go out over the territory and help him organize the unorganized or help him in his purpose, I do it."

The Court: I remember what you are stating, but I am thinking about the law on the subject.

Mr. Robertson: I am saying it all leads up to this: If a member of the Executive Board is there, if there is that hook-up which Your Honor says you remember, isn't it a fair proposition as circumstantial evidence for the jury to decide whether or not that went home to all three parent companies?

They admit that David Hunter was the agent
page 2219 } of two of them, and so you get it back to United
Construction Workers, and you get it back to
United Mine Workers. I believe I would be on sound grounds as an issue of law, but I haven't put it up there, that if it goes back to District 50 of the United Mine Workers, it goes back to United Mine Workers. Not taking that advanced a stand, isn't it a matter of circumstantial evidence and a fair inference and an issue for the jury as to whether all three defendants had knowledge of it or should have had knowledge of it?

Mr. Moore: Isn't this proposition putting the agent in the position of acting for you and then making the principal responsible for the acts of that agent? This general point is covered in American Jurisprudence under the heading "Estoppel of Principal to Deny Authority," at page 86, 2 American Jurisprudence. It is stated:

"* * * Accordingly, stating the rule as one of estoppel, where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent has authority to perform a particular act and deals with the agent upon that assumption, the principal is estopped as against such third person from denying the agent's authority; he will not be permitted to prove that the agent's authority was, in fact,

less extensive than that with which he appar-
page 2220 } ently was clothed. * * *

The Court: Do you gentlemen have any further observations you want to make?

Mr. Robertson: I have none.

The Court: Do you have any, Mr. Lowden?

Mr. Lowden: No.

The Court: All right, gentlemen. Is there anything further you wish to say?

Mr. Pollard: Yes, if I may. May I go ahead?

First, plaintiffs have said nothing with regard to the point that this is a finding instruction and therefore should contain after Item No. (6) an instruction "If you further believe that the foregoing was the sole cause of the plaintiff's injuries." In other words, a finding instruction must cover every theory of the case and therefore the jury must believe that these were the sole causes of the injury.

They didn't touch on the use in paragraph (4) of the phrase "this design", and there was been no previous reference to the design. There has been no instruction asking the jury to first find that there was a design.

The instruction in my opinion should not mention punitive damages. It should not go any further than the word "liable" on the bottom line of the first page, but if it does it should
page 2221 } certainly fairly state the law with respect to
punitive damages, which it does not now do because it gives the jury the impression that they must find, whereas punitive damages are solely within the province of the jury.

Colonel Harris: If the Court pleases, after listening to Mr. Allen, there is only one instance that he mentions in which there was any violence whatsoever, and that I submit does not show violence. He said he whipped the bully on the job. A bully is a man who tries to trample on other people, and the statement that he had whipped a bully in one instance doesn't justify the argument that they were going about Eastern Kentucky driving men off by intimidation, coercion or force.

I call your attention also to the fact that the words "close down" are a very different thing, that that phrase is very different from the allegations of paragraph (2).

Then with reference to what Mr. Moore said, he read from 18 S. W. 337, and the very case that he read from on punitive damages required that a man act maliciously and wantonly. Both those were in there, and his No. (6) does not come up to the requirement of the case that he read from himself. It

doesn't show malicious conduct and it doesn't show wanton conduct.

Mr. Mullen: Finished?

Colonel Harris: Yes.

page 2222 } Mr. Mullen: If Your Honor please, I think that (3) is wrong by using "or reasonably should have been known," as Your Honor called attention to. Mr. Raney said that if he was requested to help, he would help, that he would help the United Construction Workers, that he would help any other union in the union movement. I think the word reasonably should have been known" are wrong.

I want to speak about taking over plaintiff's job. Mr. Bryan never testified any such thing. I went all through Mr. Bryan's testimony purposely to see if he used "Taking over" or if he used "close down," which is a very different thing. Here is Mr. Bryan's testimony: (Testimony 233-234)

"I told Mr. Hart that he was correct; that Pond Creek Pcoahontas Company had awarded to us a lot of additional work in Breathitt County.

"Mr. Hart said that he had just closed down, or rather, United Construction Workers had just closed down a job which the Beckett Construction Company and the Link-Belt Company were performing for Inland Steel Company at Wheelwright, and that unless we recognized United Construction Workers, they would do the same thing to us on our work in Breathitt. Mr. Hart said that he thought we might like to discuss the matter with him and negotiate an agreement with United Construction Workers.

page 2223 } "I told Mr. Hart that we had an agreement with various A. F. of L. local unions and the Richmond Building Trades Council, and that I didn't see how we could make an agreement with the United Construction Workers.

"Mr. Hart then said that he was intending to organize all of our workers, including the carpenters, electricians, iron workers, millwrights, laborers, and everybody else.

"He said that if we didn't make an agreement recognizing the United Construction Workers, he would close down our job."

Mr. Bryan used all that. "Taking over" is Mr. Robertson's language and not Mr. Bryan's language.

Mr. Robertson: I think he used it in other places, but I am not wedded to that. I don't think there is any sanctity in those words. I don't remember it verbatim. I think he used the words "take over," but I can't cite the page.

Mr. Mullen: I read through—

Mr. Robertson: You didn't read it all. He testified for 2½ days, and I think you are wrong.

Mr. Allen: I know he testified about that.

Mr. Mullen: You mean in the end you may have gotten him to use your language, but there is his original language of what Mr. Hart told him on the phone and that is what he stated.

Mr. Robertson: I understand you have made page 2224 } your motion for a mistrial to make me quit talking back at you, so I am going to quit.

Mr. Mullen: You have a right to talk here. You don't have a right to make side remarks before the jury.

Mr. Robertson: I am afraid you will make another motion.

Mr. Mullen: That is all.

Mr. Rogers: Just one further point on paragraph (2). The objection stated there doesn't go at this point to the admissibility of evidence in connection with other jobs at all. It goes to the question of whether or not the jury should consider those in determining the liability of this defendant on this plaintiff. The question of what their purpose was in other cases is not the issue. The question is what was done here. Certainly even if some improper purpose had existed in other cases, the plaintiff here is not entitled to instruct the jury that the defendants if they had such purpose, would be liable for all damages proximately resulting from such action.

I think Mr. Lowden misunderstood me on the question of the admissibility of evidence in other cases, and incidentally the same principle is applicable whether it be on the question of the agents or the man himself involved.

As far as the instructions are concerned, under what circumstances the jury can award damages to the page 2225 } plaintiff, what has been done in other cases is not a matter for them to consider. Under some conditions in some circumstances that are clearly defined by the cases setting up the exception, that may be considered as a matter of evidence to prove one thing in one case and another thing in another case, but it is not a question that goes to the liability of the defendant and certainly should not be commented upon in any way. A particular matter that might tend to show what their purpose was in this case should not be brought out in an instruction, certainly not to the extent of declaring that the defendant is liable for such actions.

Mr. Robertson: Your Honor, may I rise to a point of per-

sonal privilege here in view of what Mr. Mullen said to me and I think this will clarify it.

The Court: What is that?

Mr. Robertson: I want to read one question and one answer. I refer to the testimony of Mr. Bryan on February 12, 1951, at pages 1992 and 1993.

"Question: You testified about your conversation over the telephone with Hart on July 14, 1949, and at subsequent times. Did you ever question Hart's statement that he represented the common laborers?

"Answer: He told me on the 14th of July during our telephone conversation that he represented the laborers. Frankly, I didn't believe him. It has turned out from his page 2226 } testimony that at that time he only represented four laborers. The next time I talked to Mr. Hart was on the afternoon of July 26 at the railroad crossing, at the job site, and at that time I told Mr. Hart that all of our laborers, that all of our workers, practically all of our workers, were members of A. F. of L. unions or had made application to become members of A. F. of L. unions. Mr. Hart then said that the laborers were not in the union, and I said 'Well, they have all signed application blanks to get in the union, I understand.' Mr. Hart said that didn't make any difference to him, whether they were in the A. F. of L. or not, he was taking over, that we were working in United Mine Workers territory, and he was going to take over the whole show."

Mr. Mullen: I say you finally got him to use the words "take over," but all through his own testimony he didn't do it.

The Court: You gentlemen are offering this?

Mr. Lowden: We will make a couple of little changes in it that will meet some of their objections if they want to. I don't know what they want to do about it. In (4) about the word "design" I think maybe we could fix that to eliminate Mr. Pollard's objection to that word.

The Court: What word do you offer in place of it?

Mr. Lowden: I think you will just have to re-page 2227 } write Section (4) a little bit to meet it. I don't have it done yet, Judge, but we can change (4).

Mr. Allen: Just say "in furtherance of said purpose." You has "purpose" up there in the beginning, went there for the purpose. Just say "in furtherance of their purpose."

Mr. Robertson: I don't see any sanctity in "design."

Mr. Allen: Just put "purpose" there.

Mr. Robertson: All right.

The Court: What else do you have in mind?

Mr. Robertson: In next to the last line from the bottom to meet one objection change "or" to "and".

The Court: You want to change the "or" to "and", in No. (6), next to the last line, first page.

Mr. Allen: Yes, put "and" in there.

Mr. Lowden: I don't think that is right.

Mr. Robertson: Leave it as it is, then. I think I offer this as it is.

The Court: Mr. Lowden said he had a couple of suggestions.

Mr. Lowden: I also would like to insert one. They didn't object to this but I think it ought to be in there that William O. Hart was acting within the scope of his authority and employment and was acting for all of the defendants. page 2228 }

Colonel Harris: Judge, may I ask a question?

The Court: Yes, sir.

Colonel Harris: I am in a state of confusion as to whether they changed the "or" to "and."

The Court: No, they didn't ask for that.

Mr. Lowden: No, we did not, because I think that is right as it is.

Mr. Robertson: Did you have something else, Mr. Lowden?

Mr. Lowden: I wanted to change the words "taking over," which will make Mr. Mullen unhappy.

The Court: What did you want to substitute for "taking over"?

Mr. Robertson: Running plaintiff's employees off plaintiff's job. That is what it was. "Forcibly taking over"?

Mr. Lowden: No.

Mr. Allen: "Forcing plaintiff to recognize them or get out of the territory."

Mr. Lowden: "And with the express and avowed purpose of forcing plaintiff to recognize one of the defendants' unions or, failing that, forcing plaintiff to get out of the territory."

Mr. Mullen: Now, how have you revised it?

(Court handing original requested instruction page 2229 } to Mr. Mullen.)

Mr. Lowden: Then as to the part that Mr. Pollard objects to about punitive damages, I don't think we can insist on that language. If there is any possibility of its being unfair, I don't think we are trying to get any unfair advantage on the

question of punitive damages. It is a matter for the jury to grant or not grant in their discretion.

Mr. Pollard: Why not put a period after "liable" in the bottom line of the first page.

Mr. Allen: You mean you want to stop at "liable"?

Mr. Pollard: Yes, or put it after "Plaintiff."

Mr. Lowden: I don't think that goes as far as we are entitled to go. If the jury makes all these findings, I think we are entitled for the judge to say to the jurors if they find all of these facts, they then may grant punitive damages. The purpose of putting in (1), (2), (3), (4), and all of them was to make them find as facts elements which create the necessary malice for punitive damages. If they do make those findings, I think they are entitled to an instruction, and if they do so find they may find punitive damages.

Mr. Robertson: That was Mr. Allen's purpose in adding that, as I recall.

Mr. Allen: That is right.

Mr. Lowden: If they make all of those findings, then I think we are entitled to have them told that un-
page 2230 } der such circumstances that they may find punitive damages.

Mr. Allen: That is right.

Mr. Lowden: But don't have to.

The Court: "But also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court." It is in their discretion.

Mr. Robertson: We can put it in their discretion, "if you deem it appropriate."

The Court: Gentlemen, I will give Instruction 8 as amended.

Colonel Harris: Does the agreement as of yesterday as to the exceptions embracing all of the objections made in argument still obtain?

The Court: That is true. There is no objection to that, is there, gentlemen?

Mr. Robertson: No.

Mr. Mullen: And the objection covers the instruction as rewritten here today.

The Court: It will be rewritten and, as presented, the objection and exception will apply to the instruction as rewritten.

Colonel Harris: And that applies to all of them?

The Court: Yes.

Mr. Pollard: For the record we do object and note an exception to grant Instruction 8.

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(Plaintiff's requested Instruction No. 9 follows:)

"The Court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages, then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of—

"(1) Profits under its contract dated October 28, 1948, with Pond Creek Pocahontas Company;

"(2) Profits under its contract dated December 15, 1948, with Spring Fork Development Company;

"(3) Profits the plaintiff would have realized from promised cost plus 5% contracts with Island Creek Coal Company and its subsidiary companies, including Pond Creek Pocahontas Company and Spring Fork Development Company, provided you believe such profits are reasonably certain as defined in other instructions;

"(4) Any loss, as defined in other instructions, to plaintiff from destruction of its business connection with
page 2232 } Island Creek Coal Company and its subsidiary companies, including Pond Creek Pocahontas Company and Spring Fork Development Company; and

"(5) Any loss to plaintiff from impairment of plaintiff's business reputation.

"And you should return your verdict in such amount of compensatory damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as the proximate result of the wrongful acts of the defendants or any of them."

Mr. Pollard: In the paragraph at the beginning, the last two lines of the opening paragraph: "then in order to determine the amount of such damages, you should consider any actual loss to the plaintiff of"—

"(1)" I think should be eliminated entirely because he is asking for profits under the contract of October 28, 1948, with Pond Creek Pocahontas Company. Under that contract the plaintiff's maximum fee is limited to \$12,000 and the testimony is that that fee has been paid in full. So he couldn't get any damages under that contract.

"(2) asks for profits under its contract dated December

15, 1948, with Spring Fork Development Company. That contract provided for payment of a fee of 5 per cent of the work done, with a maximum fee of \$2,500. I think they are asking on that contract for \$534. The testimony is that page 2233 } the contract was cancelled before it was finished.

There is no testimony to show how much additional work the plaintiff would have had to have done on that contract. The maximum he could have gotten was \$534.00 and if he had to do \$100,000 worth of work certainly he wouldn't have had any profit on it. The \$534 amounts to a little over \$10,000 on the basis of cost plus 5 per cent. If he had had \$100,000 worth of work he certainly wouldn't have had a profit. That 5 per cent payment was gross profit, so the plaintiff certainly is not entitled to recover gross profit. It is entitled to recover only the net profit it would have made if it did the work.

To No. (2) should be added the proviso in No. (3), "provided you believe such profits are reasonably certain as defined in other instructions."

"(3) is wrong because it says "Profits the plaintiff would have realized from promised cost plus 5 per cent contracts."

First, the jury has to believe it was a contract. A promised contract is not a contract. They first have to believe that there was a contract. The next objection is that it describes the contract as being with Island Creek Coal Company and its subsidiary companies including Pond Creek Company and Spring Fork Development Company. The evidence is that

page 2234 } Pond Creek Pocahontas Company is not a subsidiary of Island Creek Coal Company, and the only evidence is that the two companies had common managements, that they had different boards of directors. There is no relation of stockholders. They had common management. They had the same president. They used the same office force.

Again in No. (3) it should be the net profit which the plaintiff would have earned.

"(4) is a request for an instruction with regard to the destruction of the plaintiff's business relationship. Again the coal companies are incorrectly described.

The alleged cause of action took place in the summer of 1949. This suit was instituted on November 16, 1949. Thereafter the plaintiff continued to bid with the coal companies. I know there was one bid on November 23, 1949, a week after the suit was brought, wherein the plaintiff said, "We thank

you for letting us bid on this work." So the business relationship was still in existence at the time the suit was brought.

If we go on until May, 1950, Mr. Bryan testified he had the following conversation with Mr. Hunter, and this is on page 724 of the transcript:

"Question: Will you turn to page 3 and read that last paragraph on that page, which paragraph extends over to page 4?"

This is Mr. Bryan reading from his memorandum page 2235 } dum, his prepared statement:

"Answer: Mr. Hunter said if we got additional work in Mingo, Paintsville or elsewhere in his area, he would attempt to organize our laborers and other workers, and that if he was successful he would expect us to make a contract with UCW granting recognition to it. He said he would not undertake to tell us that we could not bid on the work in Mingo, that as American citizens we had a right to bid, but that if we got the work he would expect it to be done with UCW workers. Mr. Hunter said he would not permit us to bring in outsiders, that we would have to use local UCW labor."

The next question: "Will you also read—"

Mr. Allen: What page?

Mr. Pollard: 724. The date is January 29.

The next question: "Will you also read the last paragraph on page 4, 'Mr. Hunter again emphasized * * *'?"

"Answer: 'Mr. Hunter again emphasized that it would be o. k. for us to begin the work in Mingo County, that if we got it, he would try to organize the job and have us sign an agreement with UCW.'"

There is nothing illegal about that. Mr. Bryan testified or the evidence shows that it was at this point that they claimed the destruction of the business relationship, in May, 1950.

Here is what Mr. Salvati said Bryan told him page 2236 } about that same conversation. On page 25 of

Mr. Salvati's direct testimony in his deposition dated September 18, 1950, the first question on the page was: "Go ahead."

"Answer: He said that Mr. Hunter told him if he bid on

the job and came over to Mingo County to put up these buildings, he would—without any contract with our organization—that he would absolutely do everything in his power to see that they did not build those buildings.”

Next question: “Did he indicate what kind of thing in his power he would do?”

“Answer: I don’t recall specifically just exactly what he said in that regard other than he certainly wasn’t going to let them build the buildings.”

First, Your Honor, we want to point out as a matter of evidence there is a pretty big conflict between what Mr. Bryan’s notes said and what Mr. Salvati said that Mr. Bryan had told him what Mr. Hunter had said. Anyway, regardless of that conflicting evidence and where the stories got mixed up, Mr. Salvati wrote Mr. Bryan a letter on the 18th of May, 1950, about three days after this supposed conversation, and Mr. Salvati said in that letter to this effect: “From what you have told me about these conversations, I don’t think that you had better bid any more.”

page 2237 } So, first, we have this situation: The business relationship was still in existence when the suit was brought. Secondly, if it was ever destroyed by us, by the defendants—and we don’t think that we destroyed it—it was not destroyed until May, 1950, and if it was destroyed by what we say we would have done in May, it is not our fault anyway because it was actually destroyed by what Mr. Bryan told Salvati, because Mr. Salvati said, “From what you have told me about this situation, I don’t think you had better bid any more.”

Based on that, there is nothing in this suit on which the plaintiff can claim damage to his business relationship.

“(5)”, the plaintiff is claiming loss from impairment to plaintiff’s business reputation. On that point there is not one iota of any evidence. We have to keep in mind that this is a suit for the loss of future profits. You can have damage to reputation in a libel suit, where I have called you some horrible name, and you put on witnesses to prove that what I called you has hurt your reputation, or you can have damage to reputation in a suit where I have destroyed your credit, where I have gone around and spread the word that your credit is no good and as a result of my spreading that around you have gone to the bank to get a loan and the bank has

turned the loan down because of the reputation
 page 2238 } I have given you. You say your business has
 failed and I have damaged you. But in this case
 to show impairment of the plaintiff's business reputation my
 idea is that they would have to have brought a witness here
 and said, "Yes, I knew Bryan's reputation out there in Ken-
 tucky, and he did good work, and I was going to give him
 some work, but the defendants here have given him a bad
 reputation, have given him a reputation of not being able to
 get along with his employees."

There is no evidence that he has lost any business because
 of the reputation he got out of these alleged acts, that is credit
 has been impaired. He says that he has lost other work with
 the coal companies, but he is claiming separate damages for
 that, and he is not claiming that that hurt his reputation. He
 just says "I would have gotten other contracts and I would
 have made this much profit on them." But there is no evi-
 dence that anybody has hurt the reputation of Laburnum Con-
 struction Company and that any damages have been caused.

The last paragraph uses "and you should return your ver-
 dict in such amount of compensatory damages as will fairly
 and fully compensate the plaintiff for any of the aforesaid
 losses—"

I think heretofore he has spoken of nothing but profit, so
 instead of saying "aforesaid losses," it certainly should be
 consistent and say "aforesaid profits," "net
 page 2239 } profits," or at least it should contain an instruc-
 tion that if the jury believes that these alleged
 profits were lost.

That is all I have on it.

Colonel Harris: I have nothing to add to what Mr. Pollard
 has said.

Mr. Mullen: We ought to cite the cases on that particular
 one. Do you have the cases on the fifth section there?

Anyhow, you can have injury to the reputation of a cor-
 poration, but to have that and to show it you have to bring
 evidence of specific damage and damage that resulted in in-
 jury, and the injury resulted in damages to you, such as when
 you work with other people and the acts prevented you from
 continuing to get the same kind of business. There is not one
 word of evidence put in, not a witness brought, that their
 reputation was impaired so that they couldn't go wherever
 they might be doing business and get business. That is over
 and above the claim of loss of contracts with these particular
 customers. It is an entirely different claim and they haven't
 introduced one word of evidence to show any damage to

reputation in their general business dealings. There can't be a duplication there.

The first one says "Profits under its contract dated October 28, 1948." They have received the full amount of that.

He claimed that he got the additional school-
page 2240 } house, but that was not under the contract. The
contract was specifically limited to that one thing
and he got his full pay on that.

He got most of his pay on the next one. Under that contract most of his profits, some \$1,900—and some of the \$2,500 was paid him, and he claims therefore for finishing that work and for putting on the shingles. I agree that the shingles were an ordinary change in the contract. It is not a change in the contract. It may have been an independent contract given to him verbally, but it was not any part of the contract of October 28, 1948. On the second one he had gotten most of his pay except the remainder of the \$2,500 and anything that he might have made from putting on the shingles at 5 per cent of the cost thereof. It is not shown what that cost was.

No. (3), "Profits the plaintiff would have realized—" I think the word "would" is wrong. It should be "might have realized." It is all an uncertainty. Also, as Mr. Pollard says, the promise of a contract isn't a contract.

Those are the objections I have to those three, and we object to No. (5) because we say absolutely no evidence has been put in on that point.

Mr. Pollard: You agree with me on No. (4)?

Mr. Mullen: I agree with you on No. (4), yes.

Do you have anything you want to say about
page 2241 } this, Colonel?

Colonel Harris: Not a thing.

The Court: All right, gentlemen.

Mr. Robertson: If Your Honor please, the underlying approach to the capacity to get business and business reputation of course is based on your character and your good will, and I think the cases hold time and again that good will is nothing more than the expectancy that the old customers will come back and do business at the old stand.

We claim that the business relationship was destroyed on July 26, that that is the last time he ever made a dollar out of this business relationship, and everything subsequent to that is merely proof of the destruction of the relationship. The fact that they didn't write us until a subsequent date "don't bid any more," doesn't show anything so far as our capacity to make any money, which was destroyed, according to our theory, by virtue of Hart's actions on July 26. Every-

thing else was merely proof of that situation which resulted from his actions on the 26th.

Taking it item by item:

"Profits under its contract dated October 28, 1948, with Pond Creek Pochontas Company."

We admit of course that we collected the full \$12,000 that we were entitled to collect under that contract as written there on that date, but as these parties went along the page 2242 } contract was modified.

Your Honor, you remember the clause in the contract that there are no side agreements or secret understandings, some phrase that you put in contracts. During the trial I remember one of counsel on the other side read that expression. I think it was Mr. Mullen. Your Honor asked from the bench, "Do you mean that this is a modification or something in addition, not a secret limitation or changing of that contract when it was negotiated, but that something had developed from it?" And we said "Yes."

I speak now subject to correction. My recollection is that there was quite a lot of repair work to be done on this No. 1 tripple thing, that developed after it was over, something about a steampipe, putting it in there to thaw out coal that would come along or some repairs to it or an addition to it, subsequent to the time the contract was executed. If we try to say that we were entitled to any part of that maximum fee on the work originally contemplated, I think the defendants are right. We have no right to claim a dollar of that work. But the whole basis of this negotiation was that this was a very unattractive job on account of the difficulty of getting in there and the hardships of doing it, and therefore we weren't going to make very much money on the original one.

So far as that \$12,000 limitation we can't get page 2243 } a thing more than that unless we show that subsequently there was something else that was added to and developed from that original contract. That is the purpose of that first item.

We have no objection at all to putting after every one of them if they want it, "provided you believe such profits are reasonably certain as defined in other instructions." We have no objection to putting that it has to be something different from the \$12,000 and saying that we got the \$12,000, because we did get it.

Coming to No. (2), "Profits under its contract dated December 15, 1948, with Spring Fork Development Company."

I am perfectly willing to add there, "provided you believe such profits are reasonably certain as defined in other instructions."

Mr. Mullen admits we didn't get paid all that, and there were shipping also and other things superimposed afterwards which developed from it. This thing started out and grew and developed and evolved into what Salvati said he had promised.

The Court: Didn't Mr. Pollard suggest it should be net profits? Did I understand you to take that position, Mr. Pollard?

Mr. Pollard: I did.

Mr. Robertson: I don't know. I haven't had a chance to confer with my associates. I don't know that I would object to putting it that way. We have something page 2244 } about future profits. You remember in the trial brief, they don't have to be computed with mathematical certainty, and Baird said that he would expect from this point on that your gross profit would virtually be net profits. You have an issue of fact there.

The Court: That would be a question for the jury.

Mr. Robertson: Yes, sir; that is our point.

Then coming along to (3), I am perfectly willing to change the "would" to "might," "Profits the plaintiff might have realized from promised cost plus 5 per cent contracts—"

I thought it was very helpful the way Mr. Lowden spoke here this morning as to why the instructions were written the way they were. We realize in view of the Virginia decisions about the limitations on future contracts, that you have to keep yourself out of the realm of speculation and uncertainty, within the limits set forth in this case cited in our trial brief. Therefore, we just didn't say any kind of contracts. We said promised contracts, and promised 5 per cent contracts, because that is what Salvati said he had promised to us.

"—cost plus 5 per cent contract with Island Creek Coal Company." We are perfectly willing to put "and its associated and subsidiary companies." I think they did say Pond Creek was an associated company.

The Court: What do you want to change page 2245 } there?

Mr. Robertson: Just say "its associated and subsidiary companies."

Mr. Pollard: Including, you say?

Mr. Robertson: The evidence here is that the Pond Creek Coal Company is an associated company with the same management. I have forgotten whether they said the same ownership or not. I am certain they said the same management.

The Court: How did you amend it, before you go further?

Mr. Pollard: I might save some time by making this observation.

The Court: Wait, and let them hear you.

Mr. Robertson: It was called to my attention it should read this way, Your Honor: "With Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated or subsidiary companies."

The Court: What about Spring Fork? Just scratch that out?

Mr. Allen: Yes.

The Court: "Profits the plaintiff might have realized from promised cost plus 5 per cent contracts with Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated and subsidiary companies."

Mr. Lowden: Associated *or* subsidiary.

The Court: "Associated or subsidiary company 2246 } panies."

Mr. Robertson: "—provided you believe such profits are reasonably certain as defined in other instructions."

Are you ready for (4), Your Honor?

"(4) any losses, as defined in other instructions, to plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated or subsidiary companies."

I am perfectly willing to put in there, "provided you believe such losses are reasonably certain." I suggest that we do put that in there.

The Court: Do you want to put that in there?

Mr. Robertson: Yes.

The Court: Let me look at No. (4) again. "Any loss, as defined in other instructions, to the plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company, and their associated companies," and you are going to put in there "provided you believe such losses are reasonably certain as defined in other instructions."

Mr. Moore: That is included at the top, you see.

Mr. Robertson: We can rewrite that, Your Honor.

Mr. Allen: I think probably if you put that proviso at the end of all four then it would apply to all of them, you see. You have to add it to each paragraph. You could write it

in there once and make it applicable at all places
page 2247 } that you want it applicable, to avoid repetition
of it.

The Court: Did you want to say something, Mr. Pollard?
You said you had something that might help.

Mr. Pollard: With respect to the change of the names in
(3), plaintiff's Exhibit No. 33 defines the work as "additional
work in Breathitt County, Kentucky, which plaintiff claims
Mr. Salvati agreed Laburnum Construction Corporation
would handle on the basis of five per cent." So rather than
having any company in there, it should be Mr. Salvati.

Mr. Allen: He represented them all.

Colonel Harris: And the additional objection to that
change to include the word "associated" companies. There
are no associated companies. They are either subsidiaries
or they are not.

Mr. Robertson: Salvati said it was an associated company.
That is what he said. He was the head man in all of them.
He made that distinction between an associated company and
a subsidiary company.

The Court: One was subsidiary and the other was a wholly
owned corporation, wasn't it?

Mr. Pollard: No, sir.

Mr. Robertson: That is what I understood, Your Honor.
Subsidiary would be wholly owned, and associated would be
be entirely under one management. I under-
page 2248 } stood from the testimony that Pocahontas was
not necessarily entirely wholly owned by Island
Creek but was completely under the same management.

Mr. Pollard: But with different boards of directors, Your
Honor. Both of them are on the big board.

Mr. Robertson: They are both under the same manage-
ment. He controlled them all. I would suggest that we write
that up, Your Honor, except that I would like to go to (5)
here for a moment.

The Court: Yes. I would like to hear some discussion on
No. (5) now. I don't recall any evidence in the record.

Mr. Robertson: There is not any evidence in this way,
Your Honor, that we brought somebody here and they said,
"No, I heard about your trouble with the union, and I would
not give you any contract." We haven't any evidence more
than that. If a person says a woman has no chastity and
brings forward a man who says "I wouldn't want to marry
her," you just don't get it that way, but it still would be per-
fectly good evidence. (Laughter). What we do say here is
that the nature of the wrong done necessarily carries with it
an impairment of business reputation. What do we have

here? What did Salvati say? What about Salvati? The Island Creek Coal Company is so big that it is spoken of as the Island Creek Empire, the third biggest company page 2249 } merical coal company in America, the biggest one in West Virginia and Kentucky. So if you have been doing work with a thing of that size and lost your relationship with that empire, necessarily it impairs your business reputation.

What else have you got? You have the United Mine Workers with 600,000 members, you have District 50 with 112,000 members, you have United Construction Workers with 45,000 members, and Hart's actions, according to our theory, have run us clear out of West Virginia coal field, have run us out of the Kentucky coal field. If they hang it on all three defendants, it is necessarily known among the executive people of all three defendants, I think it is fair argument that they have run us out of construction work anywhere in America where any one of these three defendants operates at all, because it just goes with the nature of things here that people are not going to hire this Laburnum Company any more and endanger themselves in getting embarked on labor trouble with the United Mine Workers and these two component parts of it.

So we say it is inherent in the nature of things. Do you think there is anybody in Paintsville or Pikeville or Prestonsburg or any of those towns around there in Eastern Kentucky that doesn't know about this thing? Do you think any of those laborers who said they were scared to work for us before would come back and work if we went back? page 2250 } Do you think we can go back into that territory and do work? "Nobody else has been able to buck the United Mine Workers and you can't do it either." You have to buckle under if you come back in the territory, and even if you do you can't row with them. "Your name is mud and you had better stay out of here."

We say it is inherent in the very nature of the wrong that is done.

I understand Mr. Allen has had cases which had the very question up, and I will ask him to go on from there.

The Court: Before you start, Mr. Allen, I am concerned about No. (1), too, the profits under its contract dated October 28, 1948, with Pond Creek Pocahontas Company. The maximum was \$12,000, and he has been paid \$12,000 under that contract, hasn't he?

Mr. Robertson: Yes, that is true. We might say incident to or collateral to or which grew out of. We got the \$12,000.

Mr. Mullen: Mr. Bryan testified in response to my ques-

tions that this additional work was verbal, that he had no written contract for it. It is a separate matter.

Mr. Robertson: That is right. You can modify a written contract verbally.

Mr. Mullen: But he said it was an additional job of work.

Mr. Robertson: We can reword that.

page 2251 } The Court: These subsequent arrangements that Mr. Bryan had were verbal contracts, weren't they? He went on and did some work.

Mr. Allen: Your Honor, let me suggest this here. We have to discuss (5) which is a different proposition and by that time it will be lunch hour, and I want to confer with Mr. Robertson and Mr. Bryan a little bit more before discussing these others, and particularly No. (1). I think we can clear up some matters.

The Court: All right.

Mr. Allen: No. (5) deals with loss to plaintiff from impairment of plaintiff's business reputation. You can state that any way you want to. You can use the word "impairment" or "damage" or any other way. The idea is damage to plaintiff's business reputation.

This is a tort action, and in a lot of tort actions there are damages of a type that not only can't be proven, but the law doesn't require proof of them, and in some instances doesn't even require detailed allegation of them. The law presumes damages in cases where the damages can't be proved and the case is of a nature that damage may occur that can't be proved.

For instance, you can illustrate that to begin with by this old case of *Wilkinson v. Allen*. While that was page 2252 } an assault and battery case, the principle is exactly the same and the instruction given there was this—

Mr. Pollard: What is the citation, Mr. Allen?

Mr. Allen: 136 Va. 607.

"Actual or compensatory damages." That is what they are talking about. "Actual or compensatory damages are the measures of the loss or injury sustained and may embrace shame, mortification, humiliation, indignity to the feelings and the like, and need not be alleged in detail and require no proof."

That is an instruction, and the court of appeals said that was proper.

How are you going to prove that a man was humiliated? How are you going to prove that he was mortified and shamed? How are you going to prove injury from those things? It is inherent in the nature of the case. You can't do it, and the law doesn't require it.

When you come to damage to reputation, it is exactly the same thing. You take your old case of *Ramsay v. Harrison*, and just dozens of slander cases and assault and battery cases and malicious prosecution cases, and all those sorts of cases, you never have to prove that a man's reputation has been damaged, and witnesses will take the witness stand and testify that a man's reputation was just as good as it was before, and the court of appeals answer to that page 2253 } is that that is not because of your action; it is despite your action that the man's reputation has remained good. That doesn't lessen damages to you. The law presumes damages to reputation from things of this kind.

When you come to business it is the same thing. You come to a man's store, and his business is interrupted by a wrongful act, and you can't prove to save your life that he has lost customers by it, and the court says in that old *Peshine* case that nevertheless damages are recoverable. That is a famous case. I had forgotten it until it was shown to me, and I found I had used it before. The case is *Peshine v. Shepperson*, 17 Gratt. 472. I think Mr. Mullen cited it for some purpose here in the early part of this trial on some other proposition.

Mr. Mullen: I don't recall it.

Mr. Allen: Someone on your side cited it for some purpose in this case some days ago. Let's see what the facts in that case—

Mr. Pollard: May I make an observation? All we are here concerned with is the law of Kentucky on this particular question.

The Court: The law of Kentucky does apply.

Mr. Allen: Certainly the law of Kentucky applies, but we are talking about the method of proving damages. We are not talking about the actual right to recover page 2254 } damages. That is the substantive law. We are talking about the method of proving damages, and I say when you come to presumptions taking the place of proof, it is procedural.

The Court: I think you are probably right about that, Mr. Allen.

Mr. Pollard: Yes, but wouldn't whether or not you are entitled to damages to reputation where there is no proof of damage be a matter of substantive law?

The Court: Whether or not you are entitled to damages to reputation would be substantive law, would it not?

Mr. Allen: Certainly.

The Court: But the method of proving it is procedure, and I think the Virginia law would apply.

Mr. Lowden: Might I say that up to now the only objection I heard by Mr. Pollard was that he hadn't proved it. He didn't argue we weren't entitled to it.

The Court: That is the question we are discussing.

Mr. Pollard: My objection was that there was no evidence.

Mr. Lowden: But you didn't make any statement up until this moment or even suggest that you denied our right to recover it. As a matter of fact, I think Mr. Mullen said we did have a right to recover it.

Mr. Mullen: I said you did not.

Mr. Pollard: You have no right to recover if page 2255 } there is no evidence. -

The Court: I didn't understand your remarks that way, Mr. Mullen.

Mr. Allen: The facts in that case according to headnote 3 here were as follows:

"Sale of goods by agent—no authority—liability of purchaser.—A salesman of a merchant agrees with a creditor of his principal to sell him goods in payment of his debt; and at night, without the knowledge of the principal and against his wishes, known to both of them, the goods are selected and sent off by the purchaser. The purchaser acquires no title to the goods by his purchase, and is liable to the merchant for the value of the goods, and for any damages he has sustained by the taking and carrying away of the goods."

That merchant claimed that his reputation was damaged by that man coming there and taking those goods away from his place at night like that. The court of appeals goes on and says:

"The question, then, is whether such damages as are contemplated in this instruction, fall within the description of natural and necessary consequences of the acts complained of. That such acts are well calculated to injure the credit and business standing of a merchant, and that such page 2256 } will always be their effect, to a greater or less extent, seems too obvious to require proof by argument or illustration. They involve an imputation, in the harshest form, upon his credit and also upon his integrity.

And to take away a large part of a merchant's stock of goods, if it does not break up and destroy his business, must, to a greater or less extent, injure it, by impairing the means of carrying it on and diminishing its profits.

"The damages resulting from injury to the credit and business standing of the plaintiff, and from the injury to his business, were, therefore, properly recoverable, as natural, proximate and necessary consequences of the acts of the defendant."

There is considerable discussion of it there, and then they go into a discussion of the aggravated feature of it, which would apply here to some extent. I don't know whether Your Honor wants to hear the rest of that read or not, but our point is that damages are the natural and proximate result of a thing of that kind, and as the Court said in that case they don't even require any allegation in detail and certainly require no proof, as the expression goes, need not be alleged in detail and require no proof. They require no proof because the cases say it is difficult to prove, you can't prove it, and yet it is a thing that just naturally and inherently follows from the acts that were done.

page 2257 } I can read the rest of it here.

The Court: If you don't think it is necessary, don't read it.

Mr. Allen: I believe I have read it sufficiently.

He deals with an attachment here which attaches a man's business. The same principle applies:

"* * * such damages were held to be recoverable as general damages for maliciously suing out an attachment against a merchant, which was levied on his stock of goods.

"In order to ascertain the damages resulting from the interruption or embarrassment of the plaintiff's business, the nature and extent of the business, and whether profitable or unprofitable, are proper subjects of inquiry."

That is all in here. All that evidence is in.

"Without information on these points the jury will be without a guide," and so forth, "but in such a case the probable profits of the business are not the measure of damages."

They go on and discuss damages according to the rule we have stated there.

What we are contending for here is that an act of this kind—for instance, here is the situation, as Salvati said:

“Island Creek Coal Company as the parent
page 2258 } company has as subsidiaries Island Creek Coal
Sales Company, Island Creek Fuel and Trans-
portation Company, Queens City Coal Company, Carnegie
Coal Corporation, and the Carnegie Coal Corporation owns
the subsidiary, the Carnegie Dock and Fuel Company, and
the Brooks County Coal Company, another subsidiary of
Island Creek is United Thacker Coal Company. They in turn
own the Pigeon Creek Development Company.

“Another subsidiary of the Island Creek Company is the
Aldredge Realty Company. The Pond Creek Pocahontas
Company is a parent company and has as its subsidiaries
Marianna Smokeless Coal Company, Bartley Land Company,
Bartley Water Company, and Spring Fork Development Com-
pany.”

If that isn't a regular empire, I don't know what is. This
plaintiff's reputation was damaged on account of being driven
out of Kentucky and having to submit to cancellation of con-
tracts. It is a matter of common knowledge all over the coun-
try that he had the contracts cancelled on him, and things
like that inherently and naturally, morally and necessarily
under the law are presumed to injure his business.

I might refer to this federal case here, too, on the same
subject. This case is *Aladdin Mfg. Company v. Mantle Lamp
Company of America*, 116 Fed. (2d) 708, from the Court of
Appeals of the Seventh Circuit, an opinion by Judge Lindley,
reading from page 716:

“A tortfeasor is liable for all consequences
page 2259 } naturally resulting, all injuries actually flowing
from his wrongful act, whether in fact antici-
pated or contemplated by him when his tortious act was com-
mitted. Recoverable damages, therefore, include compensa-
tion for all injury to appellant's business arising from wrong-
ful acts committed by appellee, provided such injury was the
natural and proximate result of the wrongful acts.”

They cite a United States Supreme Court case there.

“ * * * This includes injury to business standing or good
will, loss of business, additional expenses incurred because
of a tort and all other elements of injury to the business * * *
These are the governing principles applying to compensatory
damages.”

After all you might say as Mr. Robertson intimated, it is

an injury to good will. For instance, take the late case decided by our own court of appeals, *Fenson v. Rabb*. Rabb sued Fenson for damages because Fenson misrepresented his good will. He didn't say good will, but what he misrepresented was his standing with some manufacturers. He said he was in good standing with them. It turned out that with two of them, the most important of them he was not in good standing. The Court of Appeals said that was a misrepresentation, that that good standing constituted good will and if he made a misrepresentation of his good will or his standing and Mr. Rabb acted upon that, then Mr. Rabb was entitled to part of his money back. The case came back and the Court of Appeals laid down the principle, and the defendants paid off and settled it.

What is involved here is a man's standing in the business world and particularly with this empire out there. The damage to reputation requires no proof but inherently naturally follows from acts of that kind, tortious acts of that kind.

The Court: Gentlemen, I think we will recess for lunch. Be back at 2:15.

(Whereupon, at 12:55 o'clock the conference was recessed until 2:15 o'clock p. m. the same day.)

page 2261 } AFTERNOON SESSION.

2:15 p. m.

Mr. Robertson: I was just saying that we would get Mr. Moore to read a case applying to subdivision (5) of Instruction No. 9.

Mr. Moore: This deals, Your Honor, with the Kentucky law, which as far as we can tell, is like the law of any other State dealing with compensatory damages in a tort action, and it is the case of *Kentucky Heating Co. v. Hood*, 118 S. W. 337. The Court states:

"Waiving, for the moment, the question of exemplary damages, we may lay it down that, whenever a person is injured in his person or property by the wrongful act of another, he is entitled to recover such a sum as will fairly compensate him, not only for the actual loss sustained, but for such consequential damages as may spring from the deprivation of business or profits as are the direct or proximate result of the tort complained of, if such consequential damages are capable of reasonable ascertainment; and, in addition thereto, the facts

justifying it, compensation for personal inconvenience and discomfort. * * *

Further down the Court states:

"It is not material whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In actions for breach of contracts the rule generally held to is that only such damages page 2262 } can be recovered as are actually sustained or such as it is reasonable to conclude were within the contemplation of the parties at the time the contract was entered into.—But this measure that obtains a contracts will not be applied in action sounding in tort. There is a wide difference between the rights and remedies allowable in the one case and in the other. * * *

"It is the wrongful act done, and the consequences that naturally result from it, that the law looks at and holds the wrongdoer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from, and are the result of, this wrongful act, although he may not, at the time, have given any thought to or have anticipated that injurious consequences would follow. It is no excuse or defense for the wrongdoer that he did not mean to commit any wrong, or did not know that any injury or loss would ensue."

Mr. Robertson: Just before lunch, Mr. Allen said that we wanted to confer; and we have conferred, and we will strike out the first item of that Instruction. At least we can get rid of one. The thought he had in mind was that we would get rid of that one element of controversy in the Instruction, and we just ask for (2), (3), (4), and (5), and we will rewrite it to carry out the thought that has been developed in the discussion of it here.

page 2263 } The Court: Are you going to put in "net profits"?

Mr. Allen: No, sir, I don't think "net profits" belongs in there, because the profits on these contracts were 5%-plus; and as our testimony tends to show, the gross profit is practically the net profit. You can't figure the net profit on the basis of allowing any home office expenses or anything like that. The net profit on the job would be all right.

The Court: (2) and (3) start off with "Profits."

Mr. Robertson: Do you think it should be "net job profits"?

Mr. Allen: We don't want the net profits figure in any such way as Mr. Holt was talking about. That is not our

testimony. They can ask for an Instruction on their testimony.

Mr. Robertson: Wouldn't it be correct as it is? It would be a question for argument. The Jury would have a right to adopt their theory if they want to; they have a right to adopt ours if they want to. If they adopt theirs, there wouldn't be any at all. It looks to me like that is for the Jury.

The Court: Do you gentlemen have anything further to say?

Mr. Robertson: No, sir.

The Court: Mr. Mullen, you or Mr. Pollard?
page 2264 } Mr. Pollard: Mr. Allen, have you got the
Grattan case that you read from?

Mr. Allen: Yes. It is right here.

Mr. Pollard: While we are looking for that, what are net profits, I agree, is a question for the Jury, but what Mr. Robertson just mentioned was the phrase "net job profits." It was clearly demonstrated that what was on Plaintiff's Exhibit 34 as job profits and which Mr. Robertson has always referred to as net job profits, would carry, on the Plaintiff's analysis of the gross profit, as gross job profit. Certainly he is not entitled to recover gross profits.

What constitutes net profits is a question for the Jury, but certainly the Jury ought to be instructed that they can only award net profits.

The Court: Do I understand that the Plaintiffs are contending that 5 percent is the net job profit?

Mr. Allen: That is what we contend.

The Court: The Defendants claim that there were no net job profits.

Mr. Allen: That there was a loss.

Mr. Robertson: It says "promised cost plus 5% contracts." If they accept Holt's testimony, we had a 1.63 loss on everything, and the more we did, the more we went broke.

The Court: You argue that the whole 5 per
page 2265 } cent is profit.

Mr. Robertson: That is right.

The Court: The Defendants argue that there were no profits.

Mr. Robertson: That there was a loss of 1.63 on everything he did.

Mr. Pollard: No, sir, that doesn't fairly state the situation.

Mr. Allen: They invite an instruction on that, too.

Mr. Pollard: The Plaintiff's own books show that what they call the net job profit is gross profit. Then you have

the question of fact whether their expert is to be believed or whether our expert is to be believed as to what you take away from gross profits to arrive at net profits.

It is admitted by all of the experts that there were certain direct expenses for which they were not reimbursable that would have to be deducted from the 5 per cent, and they say that is net profit. We say that you have to take away overhead to get net profit. I certainly don't think the Jury could fairly be instructed that they can award gross profits. If there is a dispute on the facts, what amounts to gross profits and what amounts to net profits, the Jury must be instructed that the only thing they can award is what they believe are net profits.

Mr. Allen: Neither net nor gross profit comes page 2266 } into the matter, the way we are going to redraft the Instruction. It says "Profits the Plaintiff might have realized from promised cost plus 5% contracts."

The Court: It strikes me that you may argue there are no profits at all, the way the Instruction is written. It doesn't say gross and it doesn't say net; it says "profits."

Mr. Pollard: That is the way it is drawn, Judge.

Judge, the question on (5) is not whether the Plaintiff is entitled to damages for loss of business reputation if it is proved. We say there is no evidence in the record whatsoever to prove it. The case which Mr. Moore just read, if I understood him correctly, said that those damages could be awarded; but the position the Plaintiff has taken is that those damages can be awarded without proof. Mr. Allen read from the case of *Peshine v. Shepperson*, 17 Grattan. He read this sentence:

"That such acts," speaking of the acts complained of, "are well calculated to injure the credit and business standing of a merchant, and that such will always be their effect to a greater or less extent, seems too obvious to require proof by argument or illustration."

He cited that as authority that you don't need evidence. What this says, "seems too obvious to require proof by argument or illustration," was argument or illustration for purposes of writing this opinion, and not for evidence in the case, and there is no authority in this case that you page 2267 } can have damage to reputation without proof of it in evidence.

Coming back to No. (4), we say that the uncontroverted evidence shows, first, that the destruction of the business relationship occurred after the suit was brought; and, second, it occurred as a result of acts which took place in May of 1950.

Their position is that it ought to go back to the summer of 1949 because they never got any business thereafter, but the uncontroverted testimony of Mr. Salvati is that if Laburnum Construction Company had bid, and bid low on any work, they would have been awarded it. He testified to that in June of 1950. So they can't say just because they didn't get any work, because Salvati, who they say runs the show, said they would have gotten it if they had bid low.

In connecting this Instruction with Instruction No. 8, the Court refused, in Instruction No. 8, to add to that Instruction that the Jury must find that the injuries of the Plaintiff resulted from the alleged acts. They said that will be taken care of in the Instruction on damages; and here we are, and it is not taken care of over here.

Next, on the promised contracts, if you are going to leave "promised" in, which in my opinion is patently wrong, you at least ought to put "allegedly promised."

The Court: I think you might be right about that.

Mr. Allen: Yes.

page 2268 } The Court: That is a good suggestion.

Mr. Moore: "Allegedly promised contracts?"

The Court: Where is the other place you are going to put it?

Mr. Robertson: I believe that is the only one.

The Court: I think that should be in there.

Mr. Pollard: The only objection we have is that in the last paragraph there must be an allegation that the Plaintiff suffered losses, that the Jury must find that the Plaintiff suffered losses.

The Court: Where are you referring to?

Mr. Pollard: The whole last paragraph on the page.

The Court: "And you should return your verdict in such amount of compensatory damages as will fairly and fully compensate the Plaintiff for any of the aforesaid losses the Plaintiff has actually sustained as the proximate result of the wrongful acts of the Defendants or any of them."

Mr. Allen: I think some suggestion was made here to interline there compensatory damages "as defined in other Instructions," or "the Instruction on damages."

The Court: "And you should return your verdict in such amount of compensatory damages"—right after that.

Mr. Robertson: "—as defined in other Instructions," "as defined in Instruction 10."

Mr. Allen: They may have an Instruction on page 2269 } evidence, too, so just say, "Instructions on damages." That would refer to all of them on damages.

The Court: "—Instructions on damages as will fairly and fully compensate."

Mr. Pollard: Do you have anything to add?

Colonel Harris: No, not on that.

Mr. Mullen: I haven't anything more to add.

The Court: The Court will tentatively give Instruction No. 9 as rewritten.

Mr. Pollard: Your Honor, there have been so many changes in that, that I am not certain that I have been able to follow it. I wonder if the Plaintiffs would be willing to submit us a redraft of that in the morning?

Mr. Robertson: We will do that.

The Court: The first thing in the morning.

Mr. Pollard: For purposes of the record, we object, and except to Your Honor's ruling.

The Court: Very well.

(Plaintiff's requested Instruction No. 10 follows:)

"The Court instructs the jury that damages recoverable in actions like this, in the event plaintiff is entitled to recover, are of two kinds: (1) compensatory damages, and (2) punitive damages.

"(1) Compensatory damages are the measure of the loss or injury sustained and may embrace pecuniary page 2270 } loss suffered by the plaintiff, if any; a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company and its subsidiaries, if shown by the evidence; and the profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty from past experience. The fact that such profits may be involved in some uncertainty and contingency and can be determined only approximately upon reasonable conjecture and probable estimates does not necessarily mean that they cannot be recovered at all. If it is certain that substantial damages has been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because of that uncertainty. The plaintiff has a right to prove the nature of his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the consequences naturally and directly trace-

able thereto. If and when that is done, it is for the jury to determine the amount of compensatory damages to be awarded the plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion.

“(2) Punitive damages are given, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages are given where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or where the wrongful act is accompanied by insult, indignity, oppression, or threats, or where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount claimed.

“If you should find that the plaintiff is entitled to both compensatory and punitive damages, you should find each class of damages separately; that is to say, you should award compensatory damages in one amount and punitive damages in another amount. Punitive damages need not necessarily bear any relation to the damages allowed by way of compensation, but punitive damages must bear some relation to the injury and the cause thereof. You may, the law page 2272 { and facts justifying it, assess punitive damages against one or more, and compensatory damages against the others. The question as to the amount of damages that may be assessed against each, and whether it shall be compensatory or punitive, or both, is for you to determine.

“In order that the plaintiff may recover damages in this case, whether compensatory or punitive, or both, it is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing the acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the

manner in which they were done, and did not expressly ratify the manner in which the acts were done."

Colonel Harris: If the Court please, we object to this Instruction on the following separate several grounds:

The first paragraph apparently is a direction to the jury that punitive damages are absolutely recoverable. Under the law, punitive damages are discretionary. The tenor and effect of those first three lines and two words are to direct a verdict by the jury for both compensatory damages and punitive damages.

As to paragraph (1), it says "Compensatory damages are the measure of the loss or injury sustained * * *." We question whether compensatory damages are the measure of the loss or injury sustained.

Then in the next sentence: "a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company and its subsidiaries * * *," that is not hypothesized upon the evidence, and the Island Creek Coal Company is not the one with whom it had its contracts. The Pond Creek Coal Company was the one it had its contracts with. It is improper to embrace both the Island Creek and the next three words, "and its subsidiaries," "and the profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations * * *." There is a fundamental requirement that the plaintiff introduce enough evidence to enable the jury to make some calculation of the profits, and apparently that sentence is lacking in there.

Then the next short sentence: "But only such profits may be recovered as can be ascertained with reasonable certainty from past experience." That is too general and embraces an unlimited period of time, and embraces contracts of every kind and character. The business experience page 2274 } that he had and what he has shown are contracts on cost plus 5%. It is only on that basis that the jury has any evidence from which to figure profits.

Then also, it leaves out our fundamental contention that not all profits are recoverable, but only net profits.

I am not sure about the next two sentences. I will try and check with my brief. They look as if they might have been copied. I ran across a statement that looked somewhat like those two sentences in my investigation, but I haven't had a chance to check it here.

On the next page, the third line down, he has it, " * * * the

consequences naturally and directly traceable thereto." That isn't the correct way of limiting or circumscribing the damages recoverable. It is the proximate consequences that determine recoverability. If they are not proximately caused by the wrong of the defendant, they are not properly recoverable.

In paragraph (2), he again starts off wording it in such way that he leads the jury to believe they are under a duty to give punitive damages. His bald statement beginning the paragraph, "Punitive damages are given, * * * that isn't the law. Punitive damages may be given in the sound discretion of the jury."

Then again, in the next sentence, he doesn't limit it by the phrase "may be given in the sound discretion of the jury."

Then all of those definitions of what justifies page 2275 } the award of punitive damages it seems to me are not the true Kentucky doctrine on punitive damages. One of our requests copies of law of Kentucky on punitive damages, and we think this is an incorrect statement of it.

Taking the charge down to there, and bearing in mind Charge No. 9 which Your Honor has just indicated he would allow, the two charges taken together are confusing.

In the last line of paragraph (2) it seems to me that the limitation there in the written charge at the very end, "not exceeding the amount claimed," is an indication to the jury at that point that Your Honor expects them to give so much punitive damages that they will run completely over the amount claimed unless they are restrained, and which would have a prejudicial effect upon the outcome of the jury's deliberations.

As to the statement that compensatory and punitive damages should be separated, on that I would like to be allowed the privilege to consult with the lawyers from Virginia and Mr. Owens as to whether we want to agree to that or to object to it.

The Court: Would you like to consult now, Colonel Harris?

Colonel Harris: May I finish this and see what the last paragraph is.

page 2276 } The next statement "you may, the law and facts justifying it, assess punitive damages against one or more, and compensatory damages against the others." That is an incorrect statement of the law where liability of one is based on the principles of agency, because they could not award punitive damages against the principal and not give punitive damages against the agent. This indicates that they could. In other words, having in

mind the United Mine Workers as the treasury into which they hope to enter, they leap over the responsibility that rests upon them to prove a punitive damage case against those whom they have so strenuously denominated as agents of the United Mine Workers in all their argument before this Court.

Then looking at it still more closely, notice how suggestive and entangling the phrase is at the end of the second line on page 2: "You may, the law and the facts justifying it." That is the equivalent to some of those jurors to a statement by Your Honor that both the law and the facts in this case justify the assessment of punitive damages, and nothing justifies the assessment of punitive damages. Your Honor couldn't direct the jury that anything justified punitive damages. Damages of a punitive nature are permissive, and they are not directory.

Mr. Allen: Let's say "authorize," then.

Colonel Harris: That isn't what you have page 2277 } written, which I am discussing.

Mr. Allen: Excuse me.

Colonel Harris: I don't mind.

The last paragraph is on the question of agency, and it seems to me that it again adds still a different test to determine the application of the principle of agency. He winds up by saying that if they were committed within the scope of his employment and in the performance of a duty to his principals to organize the unorganized. He enlarges the area of responsibility.

Then take the last sentence: If, in doing the acts which he was authorized to do—" That again seems to tell the jury that the Court thinks he was authorized to do these acts. "If, in doing the acts he was authorized to do, he did them in such manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done."

We have to insist, of course, that the correct test of responsibility is the wording of the charge that we wrote, dependent on the Norris-LaGuardia Act, as I recall.

Let's see if you have anything else here that I left out.

An additional one that the instruction is ab-page 2278 } stract and does not correctly state the law as to compensatory damages as they relate to the evidence in this case.

Mr. Pollard: May I make two points.

Colonel Harris: Yes, sir.

Mr. Pollard: No. (2) starts off, "Punitive damages are

given, not solely as compensation, but rather with a view, and so forth.

It is my understanding that punitive damages are not given as compensation.

Mr. Moore: They are given as both, Fred.

Mr. Allen: Yes.

Mr. Pollard: I haven't seen authority on that.

Colonel Harris: I have all the cases on punitive damages in Kentucky listed here, I think.

Mr. Lowden: Why don't you let us come back to that one when it comes our turn.

Mr. Pollard: That is all we have.

Mr. Lowden: Do you all want to confer?

Colonel Harris: About the separation of damages we want to confer.

Mr. Allen: Do you want me to give you the Kentucky case that requires that to be done, that says that must be done?

Colonel Harris: I think that is procedural and not substantive. I think the procedure of Virginia *de-*
page 2279 } termines the form of verdict.

Mr. Allen: We might help you out on that if you agree to that.

Colonel Harris: It determines the form of the verdict. I have to confer with my associates.

(Separate conference.)

Colonel Harris: On that question in the event the jury should disregard our arguments and our evidence and bring in a verdict for the plaintiff, we are willing for the jury to be instructed about separation of their verdict into compensatory damages and punitive damages.

Mr. Allen: You are not willing to instruct them to return a lump sum verdict including both classes of damages without separating the damages?

Colonel Harris: No, I wouldn't agree to that. The purpose of agreeing to separation is to see exactly what they are doing or what they have done in the event they bring in a verdict for the plaintiff.

Mr. Allen: That is right.

Mr. Mullen: In other words, we don't have any objection to that part of the instruction which says they should find each class of damages separately.

Colonel Harris: The statement, if the Court pleases, that I have made, I think sufficiently states the arguments that I have on it. If either of you gentlemen has any
page 2280 } arguments to make—

Mr. Pollard: I have none.

Mr. Mullen: I am in agreement with Colonel Harris on the objections he has made to the instruction for the reasons given, so I won't go all over it, but there is one thing down there that I want to elaborate a little. That is in the middle of paragraph (1), "But only such profits may be recovered as can be ascertained with reasonable certainty from past experience." I object to the words "past experience" because it has been shown in this case that those contracts on which he made good profits were lump sum contract or contracts in which he had a much larger percentage, whereas what he is complaining of here now is loss from cost-plus type of contract. The contracts he put in evidence, on which he made money, on some of them he made 30 per cent. That experience doesn't go to the present claim.

The Court: Would you suggest then that you add "from past experience on cost-plus 5 per cent contracts"?

Mr. Mullen: Either that or leave out the words "past experience."

Mr. Allen: Just leave out the words "past experience."

Mr. Pollard: I think it would be better, Your Honor, to add—

page 2281 } Mr. Robertson: Some of them are lump sum.

Mr. Mullen: That is exactly the reason I said "past experience" doesn't belong in there.

Mr. Allen: Cut it out. We agree to cut out "past experience."

Mr. Robertson: Cut it out.

The Court: Cut that out then, Mr. Mullen?

Mr. Mullen: Either that or phrase it the way Fred suggested.

The Court: You are asking, then, that "from past experience" be eliminated.

Mr. Pollard: That would be all right.

The Court: That is agreed to by counsel for the plaintiff. Strike it out.

Mr. Mullen: I won't take the Court's time repeating the objections which were made by Colonel Harris. They are before you. I don't know whether you want to go over them again or not.

The Court: Do I understand, then, that you gentlemen do not object to the last paragraph beginning on page 2, with the exception of the statement made by Colonel Harris in regard to the "law and facts justifying it"? That is in the third line on the last page.

Mr. Pollard: As I understand it, Judge, there are only two changes in here,

page 2282 } The Court: Colonel Harris criticized the phrase, "the law and facts justifying it."

Mr. Allen: That was put in there, if Your Honor please, to round the instruction out as I thought it would have to be, upon objection from them by not having it in there, but if they don't want that in there, cut it out, the whole sentence beginning with "You may" down to the end of that paragraph.

Mr. Lowden: That wasn't what the Judge is getting at, I don't think. He is getting at whether or not he agreed that it was possible in this case to assess punitive damages in different amounts against different ones, weren't you, Judge?

The Court: Yes.

Mr. Allen: Yes, but my point, Judge, is that Colonel Harris objected to this part of the instruction, and my suggestion was if he objected to it and the record shows he objected to it, we might withdraw that sentence from it.

Mr. Mullen: We object to the whole sentence.

Mr. Allen: Beginning with "you" and down to "is for you to determine."

The Court: Are you asking, then, that that come out and you are not offering that?

Mr. Allen: No, I am agreeing that that may page 2283 } be eliminated at their suggestion.

The Court: Does the court understand that you ask that that sentence come out, Colonel Harris? It is two sentences, rather, at the top of page 3, beginning with "you."

Mr. Allen: Beginning with "you" and ending with "determine."

Colonel Harris: I think both of those should be eliminated.

The Court: That comes out.

Mr. Pollard: That change and the change cutting out "from past experience" are the only two changes in the instruction?

The Court: They are the only two that have been made so far.

Mr. Pollard: I just wanted to get up to date on the changes.

The Court: In No. (2) the first paragraph on page 2, if I recall correctly, Colonel Harris stated that "are" should be changed to "may be." Am I correct in that statement, Colonel Harris?

Colonel Harris: That is my recollection.

The Court: Is there any objection to changing that?

Mr. Robertson: No.

Mr. Allen: I don't think it makes any difference in the

instructions, Your Honor, but I think all of us
page 2284 } have overlooked the object of this instruction.

We are simply instructing the jury in what kind of cases punitive damages are given. Then we say they may in their discretion give them under the following circumstances. It is the object of the instruction simply to tell the jury the kinds of cases in which such damages are awarded, and then we say if so and so took place they may award such damages. The "may" comes in at the proper place down there. I don't object to "may be" up there.

The Court: We will change that, then, to "may be".

Mr. Robertson: And in the fifth line.

The Court: In the fifth line change "are" to "may be".

Mr. Robertson: In the beginning, the third line from the top.

The Court: The Colonel suggested we add the word "proximately" and the "proximate consequences."

Mr. Allen: Where is that?

The Court: In the third line at the top of page 2.

Colonel Harris: I missed the one you made just before that.

The Court: That was on the same page, the fifth line under (2).

Colonel Harris: Yes, I had it already written. Did you leave off "in the discretion of the jury"?

page 2285 } The Court: Where is that?

Colonel Harris: Where you substituted "may be given".

The Court: "In the discretion of the jury." I believe you did suggest that.

Mr. Allen: Where is that?

The Court: The first line in (2), "may be given in the discretion of the jury."

Colonel Harris: And that applies four lines down, too.

The Court: I guess it would.

Mr. Allen: The last paragraph is written specifically to apply to the whole instruction and winds up and tells them that they may in their discretion do so and so.

The Court: It says "In all such cases the jury may assess damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount claimed."

I am wondering whether you need to do that since you have it at the bottom.

Mr. Allen: You emasculate the instruction and make it hard for the jury to read if you keep repeating that.

Mr. Robertson: Judge, if you go back to page 1—

The Court: Let's get this settled first. What do you think about that, Colonel? It is stated in the last page 2286 } sentence of that paragraph.

Colonel Harris: Of course I don't agree that that is a correct statement of what justifies punitive damages just above it.

The Court: You are saying if that is given this should be in there?

Colonel Harris: Yes, sir. I understand I have an objection to it.

The Court: The Court hasn't ruled on any of the question yet. I am trying to work it out as far as we can.

Mr. Robertson: There is one more correction on page 1.

The Court: Do you think "in the discretion of the jury" ought to be in there in view of the last sentence in that paragraph?

Colonel Harris: Yes, I do, Judge. You mean those two up above at the top on (2)?

The Court: In No. (2) on the second page, "Punitive damages may be given in the discretion of the jury."

Mr. Allen: We are not going to be sticklers about that.

The Court: All right. Leave it in there.

Mr. Robertson: Both places.

The Court: And put it in in the fifth line, too, "may be given in the discretion of the jury."

page 2287 } Mr. Robertson: Judge, on page 1, paragraph numbered (1), the fifth line, after "subsidiaries" should be "or associates."

Mr. Lowden: And also change it from Island Creek to Pond Creek, which I believe was suggested.

The Court: Pond Creek Coal Company.

Colonel Harris: Instead of Island Creek?

Mr. Lowden: Yes, sir. I think you are right about that.

Mr. Robertson: I think it ought to be left Island Creek.

Colonel Harris: It is Pond Creek Pocahontas Company, isn't it?

Mr. Bryan: It ought to be Island Creek Coal Company, Pond Creek Coal Company and their associates and subsidiaries.

The Court: What is that?

Mr. Moore: Island Creek Coal Company, Pond Creek Pocahontas Coal Company and their subsidiaries or associates.

Colonel Harris: I understood from Mr. Lowden you were striking out Island Creek Coal Company.

Mr. Robertson: No.

Mr. Lowden: I was overruled.

Mr. Allen: We are trying to make it conform to the other instruction.

page 2288 } The Court: "business connection with Island Creek Coal Company, Pond Creek Coal Company and their subsidiaries."

Colonel Harris: We just think that makes it worse.

The Court: "and their subsidiaries or associates."

Mr. Robertson: We have the whole empire in there now.

The Court: Very well. Are you gentlemen making a memorandum of that?

Mr. Allen: Yes. We are prepared when Your Honor gets around to it, to discuss their objections.

Colonel Harris: I didn't have them written out.

The Court: I know you didn't.

Mr. Moore: You objected to the wording "punitive damages."

Colonel Harris: And to the principles of law also.

Mr. Allen: I understand that. I have a memorandum of that. I just want to know when you are through and when you are ready for us to start.

The Court: I am ready now.

Mr. Allen: If Your Honor please, this instruction was drawn of course in the light of the fact that it was to be read in connection with all the other instructions, and we couldn't insert in this instruction, repeating things said in other instructions. The sole object of this instruction was to tell the jury about the two classes of damages, to
page 2289 } define the two classes of damages, and the circumstances under which the two classes of damages, either or both, may be awarded. We have defined compensatory damages and punitive damages as defined by the cases in Kentucky for the reason that we think the right to recover damages, whether compensatory or punitive, is a matter of substantive law.

There are two differences between the Kentucky law and the Virginia law. One is that in Virginia punitive damages are given solely for the purpose of punishing the defendant. The language expressing the idea always includes language like this: Punitive damages are not given as the plaintiff's due but solely for the purpose of punishing the defendant and deterring him and others from the commission of like offenses. But in Kentucky that is not true. Punitive damages are given in part as compensation to the plaintiff. So I had to take care of that in this instruction.

Then under the Virginia law there must be some relation between the punitive damages and the compensatory damages. Under the Kentucky law punitive damages need not

bear any relation whatsoever to the compensatory damages. So that is another thing I had to take care of.

Colonel Harris: But if I may interrupt, they must bear some relation to the injury.

Mr. Allen: They have to bear some relation page 2290 } to the injury, and that is what the instruction states. It has to bear some relation to the injury.

Another difference is that under the Virginia law a verdict cannot be rendered severally, awarding so much damages against one and so much against another, whether punitive or compensatory. The damages awarded have to be a lump sum and nobody knows how much is punitive and how many is compensatory. But the cases in Kentucky say they must separate the damages so the Court can say if the punitive damages are too much and can whip them out or cut them down, and if the compensatory damages are too much they can do likewise. They can handle the matter on appeal if they know what the jury had in mind in awarding compensatory damages and what they had in mind in awarding punitive damages. That is why the instruction is drawn as it is.

The definition of compensatory damages is that taken from the Kentucky cases. The definition of profits and the circumstances under which profits may be recovered are taken from the Kentucky cases.

Colonel Harris: What is the name of the case?

Mr. Allen: We have them in our memorandum. I was going to read them presently when I come to the cases. I will give them to you before I say anything about the cases in terms.

Colonel Harris: All right.

Mr. Allen: The statement about profit is as page 2291 } guarded as I think it can possibly be under the Kentucky law. As a matter of fact, there isn't any substantial difference between the Kentucky law and the Virginia law on the recovery of either compensatory damages or profits.

When you come to the profits you will notice that we start out with "profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty—" That is both the Kentucky law and Virginia law.

"The fact that such profits may be involved in some uncertainty and contingency and can be determined only proximately upon reasonable conjectures and probable estimates

does not necessarily mean that they cannot be recovered at all. If it is certain that substantial damages have been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because there is some uncertainty as to the amount. The plaintiff has the right to prove the nature of his relationships with the coal companies, the circumstances surrounding the acts of the defendants, and," inserting what they suggested, "the proximate consequences naturally and directly traceable thereto. If and when that is

page 2292 } done—in other words, when all that is proven—

" it is for the jury to determine the amount of compensatory damages to be awarded the plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion."

I don't think anything could be fairer under the Kentucky law or the Virginia law, either. There is no substantial difference.

When you come to punitive damages, we will use the words "may be" as he suggests.

"Punitive damages may be given in the discretion of the jury, not solely as compensation." We have to put that in there because punitive damages are not given solely for punishment.

"Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or where the wrongful act is accompanied by insult, indignity, oppression, or threats, or

page 2293 } where the wrongful act is committed in a manner so wanton or reckless as to manifest a willful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount complained."

There is objection to "not exceeding the amount claimed." I just don't know how we are going to correct that without turning the jury loose to find any amount, which may or may

not exceed the amount claimed. We are certainly limited to the amount claimed.

Mr. Robertson: Let me interrupt one moment. Our court has said that you ought not to say, for instance, \$500,000, which was suggested, but that that was the right way to do it.

The Court: This is the practice.

Mr. Allen: This is absolutely the practice in our courts. It would be improper here to say "not exceeding \$500,000," but just "not exceeding the amount claimed," which is the mildest way to express it to hold them down to some limit.

I am going to ask Mr. Moore to read that Kentucky case which contains a definition of punitive damages and when they may be awarded, and I think it contains every expression that I have in this instruction.

Colonel Harris: The name of it, first.

page 2294 } Mr. Moore: The same case, the Hood case.

The Court: What is the citation?

Mr. Moore: 118 S. W. 309, *Kentucky Heating Company v. Hood*.

Colonel Harris: It is on page 30 of my memorandum.

The Court: Before you start reading, Mr. Moore—Mr. Allen, on page 2, under No. (2), line 5, after "given" we agreed to insert "in the discretion of the jury."

Mr. Allen: That is right.

The Court: I didn't know whether you had that or not.

Mr. Allen: I have a little memorandum of that and forgot to read it.

The Court: All right, Mr. Moore.

Mr. Moore: This is very short, Your Honor.

"It is the general rule that exemplary damages in cases of this character are not allowable unless the wrong complained of is committed in a malicious, aggravating or insulting manner with reckless disregard of the rights of the injured person."

Practically the same words are used right here. Then they cite cases. The court goes on to say:

page 2295 } "Measured by this rule, we have little difficulty in reaching the conclusion that the conduct of the servants of the appellant in cutting the pipe and throwing the meter in the ash can was, to say the least of it, a high-handed, aggravating piece of business done in utter and reckless disregard of the rights of the appellees."

We have used almost identical words.

Mr. Allen: Here is the one I had reference to here. I don't know whether you have it there.

Mr. Pollard: Excuse me, Mr. Allen. I understood that you were citing a case to state the proposition that punitive damages may be awarded as a way of compenstion.

Mr. Moore: No.

Mr. Pollard: I misunderstood you.

Mr. Moore: I have the other one, Fred.

Mr. Pollard: Will you give me the citation of it, please?

Mr. Moore: 2 American Jurisprudence.

Mr. Allen: It is a Kentucky case.

Mr. Moore: Let Mr. Allen go ahead and I will find it for you.

Mr. Pollard: All right.

Mr. Allen: The case which I undertook to follow verbatim was the case of *Louisville & Nashville Railroad Company v. Ballard*, 3 S. W. 530. In that case the court said:

"It has been said that they"—referring to punitive damages—"are allowable where the wrongful act page 2296 { has been accompanied with circumstances of aggravation or if a trespass be committed in a high-handed or threatening manner or where the tort is accompanied by oppression, fraud, malice or negligence so grave as to raise a presumption of malice, or where the wrongful act is accompanied by an insult, indignity, oppression or inhumanity."

I think all the words I have used were found in this case.

Mr. Pollard: What was the citation?

Mr. Allen: That was *Louisville & Nashville Railroad Company v. Ballard*, 3 S. W. 530.

Mr. Pollard: What is the date of that case?

Mr. Allen: 1887, and it has been referred to time and again in later cases. The rule has never been changed so far as I know.

The same thing is said in *Louisville & Nashville v. Fowler*, 107 S. W. 703.

Colonel Harris: May I ask a question, Mr. Allen.

Mr. Allen: Yes, sir.

Colonel Harris: You don't claim that those two sentences beginning where you struck out "past experience" are exact quotations of any Kentucky decisions, do you?

Mr. Allen: You are talking about the compensatory damages now?

Colonel Harris: Yes, on profits.

page 2297 } Mr. Allen: No. It is practically so. I couldn't just take things out of an opinion and relate them to an instruction, but the language in the punitive damage instruction is the identical language that was used in those cases which the Court said made out proper cases for the recovery of punitive damages.

Colonel Harris: As you read it and as Mr. Moore read it, I thought I heard the word "malice" and also "with intent to injure" in the decisions, and I don't see that in either one of these.

Mr. Allen: The disjunctive "or" is used. The opinion doesn't use all of those terms in the conjunctive. It says "or". We select any of them that are sufficient. For instance, some of the cases just dealt with one or two of those things. Some of the cases even say where the conduct is so reckless as to indicate an indifference to the rights of parties, that that is a basis for punitive damages.

Mr. Moore: Fred, do you want the citation now?

Mr. Pollard: Yes. Is it in your trial brief?

Mr. Moore: It is in one spot.

Mr. Pollard: What page?

Mr. Moore: Page 17. The case is *Louisville & Nashville Railroad v. Ritchel*. It starts on page 16, but look at the quote right at the top of page 17 where it states:

page 2298 } "As the jury, even under the instructions as given, might have awarded compensatory damages, though nominal in amount, and under a proper instruction might have awarded damages for humiliation and mortification of feeling, we conclude the fact that the jury returned a verdict of punitive damages only furnishes no just reason why the verdict should not be allowed to stand, since, under the rule in force in this state, punitive damages when allowed, are given as compensation to the plaintiff, and not solely as punishment to the defendant."

That case is cited in American Jurisprudence.

"However, according to some of the cases exemplary damages may properly partake of both punitive and compensatory character in as much as in practice they are given both as compensation to the plaintiff and at the same time as a punishment for the defendant and a warning to others."

Mr. Allen: In the case of *Memphis and C. Packet Co. v. Nagel*, 29 S. W. 743, the court instructed the jury, and I am reading the language of the instruction exactly:

"If he accomplished his willful act * * * or used violence or unlawful personal restraint or accompanied his wrongful Act towards his passenger with conduct insulting in words, tone or manner, he becomes liable to all the remedies of the law against tort feorsors, including the liability to pay punitive damages in cases where same may be law-
page 2299 } fully adjudged."

Here is another instruction given in that same case:

"And if they believe from the evidence that the failure of defendants' employees in charge of said boat to put plaintiff off at New Albany was willful or the result of gross or wanton or intentional neglect on the part of the defendants' employees in the discharge of their duties to carry her and her trunk and put her off, or that the conduct of defendants' employees was insulting towards plaintiff either in manner, words, or tone, they may assess the damage at any sum which they may believe from all the evidence in the exercise of a sound discretion the plaintiff ought to recover, not exceeding the amount claimed."

Note the similarity of our instruction to that.

Then in the case of *Grant v. Taylor*, 4 S. W. 2nd, a much later case, 741—

Celone Harris: Those are all old cases.

Mr. Allen: The court said in an instructions limiting the jury to compensatory damages:

"The plaintiff offered no instruction on punitive damages and no such instruction was given. If the testimony introduced in behalf of the plaintiff was true and the conduct of David, the manager of appellant's store, was cruel and oppressive and showed a reckless disregard for
page 2300 } plaintiff's rights * * * an instruction on punitive damages would have been entirely proper. Whether or not the damages awarded would be assessed as punitive damages we need not determine. In determining the amount of compensatory damages to be awarded the jury was authorized to consider any pecuniary loss suffered by the plaintiff, any mental or physical suffering endured by her or any injury to her reputation caused by the prosecution."

In the case of *Smith v. Middleton*, the court said about an instruction about destroying a man's earning capacity, the instruction read this way:

"If the jury find for the plaintiff they will fix the damages for such sum not exceeding \$10,000 as would be a fair compensation to the estate for the destruction of the power of the deceased to earn money. And in fixing such damages the jury should take into consideration the age of the deceased at the time of his death and the probable duration of his life."

I read this case of *Louisville & Nashville Railroad Co. v. Ballard*, I believe, which is one that contained a great many definitions of punitive damages, and when and under what circumstances they may be recovered.

Let's see if I have any other memorandums here to add.

Mr. Moore: I might say the Ballard case is page 2301 { the leading Kentucky case on it. It is cited all the way through. There are pages and pages of it.

Mr. Allen: You gentlemen do not disagree with us that the Kentucky law requires the jury to separate the two classes of damages. I don't want to have to read His Honor a decision supporting this view if you agree.

Colonel Harris: We agreed that he might instruct the jury to do that in this case.

Mr. Allen: That is all we have to say.

Colonel Harris: Are you going to say anything else? If not, I want to reply to those two cases.

Mr. Robertson: I have nothing more. That is all.

The Court: All right.

Colonel Harris: If the Court please, there are a number of cases on punitive damages in Kentucky, and what they have done in this is to go through and pick out the mildest possible expressions.

Mr. Pollard: You say the mildest?

Colonel Harris:

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page 2303 {

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In this case when Mr. Hamilton Bryan went down and talked to Mr. Hunter, Mr. Hunter in Hamilton Bryan's own words seemed to think that he had the right to do what they did as long as they didn't expressly authorize somebody to use violence.

Under those circumstances where one man thinks he is exercising a right to strike and set up a picket line, and the

other man thinks that he is exercising a right to hire whomsoever he pleases, it seems to me that the instruction on malice and deliberate design to injure the plaintiff is a proper instruction under those circumstances and no other kind of liability for punitive damages should be imposed.

Mr. Robertson: We are perfectly willing to put "malice" in there.

Mr. Allen: It must be in all of them.

Mr. Harris: I don't agree to those disjunctives at all, if the Court please. I don't want to appear to agree to that.

The Court: Let us see. Where is the first page 2304 } place?

Mr. Robertson: The fifth line down on page 2, under paragraph (2), "punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation or committed in a high-handed and threatening manner"—I should say it should be put there, "or maliciously, or where the wrongful act is accompanied by insult, indignity, oppression, or threats or with malice." You can put it in there almost anywhere.

The Court: "Punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation or committed in a high-handed and threatening manner, or maliciously, or where the wrongful act is accompanied by insult, indignity, oppression, or threats—"

Mr. Pollard: Your Honor, there is one thing that worries me about their instruction on punitive damages, and that is where they say that it can be awarded for threats, where the tort complained of is itself a threat. That would make any tort which was committed by way of a threat *per se* a tort wherein punitive damages could be awarded, and I can't conceive that that is the law.

Mr. Robertson: But the commission of the tort is in issue. Hart said they didn't commit a tort. They have to find a tort.

The Court: That is a question for the jury.

page 2305 } Mr. Pollard: Yes, but if they find that there was a tort, then *per se*, according to the way the instruction is worded, it is a case for punitive damages.

Mr. Robertson: They have to find these other things, in their discretion also.

Mr. Moore: That is the purpose of punitive damages, so they won't resort to threats.

Mr. Pollard: In other words, the instruction amounts to this, that if you believe the defendants, any defendant, committed the wrongful acts complained of, then *per se* it is a

case where punitive damages may be awarded in the discretion of the jury.

The Court: May be awarded.

Mr. Pollard: Yes.

Mr. Robertson: It doesn't say that at all.

Mr. Pollard: So long as you have "threats" in there.

Mr. Robertson: It doesn't.

Colonel Harris: They claim that we interfered with their business relation by bringing a mob over there. In one part they say we are guilty of threats, and in the other they say we are guilty of violence. If we made any threats, under that instruction they have to give punitive damages.

Mr. Pollard: Of it is a case where punitive damages can be awarded by the jury.

page 2306 } Mr. Robertson: It may do it, yes.

Mr. Pollard: It is a *per se* case.

Mr. Robertson: Suppose the jury believed that Hart came over there and was acting in good faith in the conscientious discharge of his duty, they certainly wouldn't give us one penny of punitive damages.

Colonel Harris: In the case I read from they just took the first word "maliciously," and here is the exact language of the court: "If in so doing they acted maliciously, and with a design of injuring appellee in its business—" They leave that out.

The Court: Do you have any objection to putting that in?

Mr. Allen: Put that right along with the language "maliciously" there.

The Court: Read that to me again, Colonel.

Colonel Harris: "And with a design of injuring appellee in its business."

Mr. Robertson: That wouldn't be appellee.

Colonel Harris: Plaintiff, of course.

The Court: What was it, "in its business"?

Colonel Harris: Yes, sir; in its business.

Mr. Lowden: You don't sound like you have a heck of a lot of confidence, calling us appellees.

Colonel Harris: I was reading from the book.
page 2307 } I have a lot more confidence than you think I have.

Mr. Lowden: I don't know about that. I said it did not sound like you had.

Colonel Harris: This is quite pleasant, Judge.

Mr. Pollard: I have nothing, Your Honor.

The Court: Colonel, do you have anything further?

Colonel Harris: No.

Mr. Pollard: Did you initial this exhibit?

The Court: The Court will grant Instruction 10 as rewritten.

Mr. Mullen: Note an exception for the reasons stated in the argument.

Colonel Harris: In other words, Judge, it is our contention that the corrections didn't cure the errors that were contained in the charge.

The Court: You can state any further objections that you want at this time.

Mr. Mullen: You mean when they are rewritten and come back?

The Court: When they are rewritten, or you can do it now. If they come back rewritten and you have already stated your objection and exception, I take it you wouldn't have to renew it.

Colonel Harris: Thank you.

The Court: Now, No. 11.

page 2308 } (Plaintiff's requested Instruction No. 11 follows:)

"The Court instructs the jury if you find your verdict for the plaintiff against all three defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against all three defendants and assess plaintiff's damages at, representing \$. compensatory damages, and \$. punitive damages."

"If your verdict is for the plaintiff against two defendants and in favor of the other defendant, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against the defendants and and assess plaintiff's damages at \$., representing \$. compensatory damages, and \$. punitive damages; and we find in favor of the defendant"

"If your verdict is for the plaintiff against one defendant and in favor of the other two defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against the defendant and assess plaintiff's damages at \$., representing \$. compensatory

damages, and \$. punitive damages; and
 page 2309 } we find in favor of the defendants and

"If your verdict is for all three defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the defendants."

Mr. Allen: That is just a form for the jury to go by.

Colonel Harris: Yes, but it is an incorrect form, if the Court pleases, because it direct a verdict for punitive damages if they find a verdict for the plaintiff. Yes, it does. You say "The Court instructs the jury if you find your verdict for the plaintiff against all three defendants, your verdict should be in the following form:

"We, the jury, on the issues joined, find for the plaintiff against all three defendants and assess plaintiff's damages at \$., representing \$. compensatory damages and \$. punitive damages."

Mr. Robertson: They could put in zero for punitive damages.

Colonel Harris: I know, but that is a direction. Zero wouldn't be an assessment of damages.

Mr. Robertson: Yes, it would. It would be the assessment of no damages.

Colonel Harris: Nothing is not something.

The Court: What would you suggest, Colonel?
 page 2310 } I see what you are talking about.

Mr. Lowden: The way you do it, Judge, in the first line you say "your verdict should be in one of the following forms," and then put that one and another one and let them pick them out.

The Court: Why couldn't you rewrite this instruction and have a form where you allow just compensatory damages and then have a form underneath that, "If you allow compensatory and punitive damages, use the following form for each one." Would that correct the situation as far as you are concerned, Colonel?

Colonel Harris: It would correct it on that, yes, sir.

Mr. Robertson: Let's see if we can't work out a form, then. We will work it out the way we think it ought to be, and let them work it out the way they think it ought to be and come back with it tomorrow.

The Court: I think that would probably correct the situation as far as the Colonel is concerned and you gentlemen, too.

Mr. Robertson: We agree to rewrite it and have it here tomorrow.

Mr. Pollard: Is there any other objection to this?

Mr. Mullen: There is one other objection, isn't there? There should be one other form of verdict in there.

Mr. Robertson: We will bring it back.

page 2311 } The Court: Wait, Mr. Robertson.

Mr. Allen: We will just ask for the first part of it.

Mr. Robertson: We ask for verdict against all three defendants and you can ask for whatever you want.

The Court: What did you start to say?

Mr. Mullen: We went over it and read it, and there was something here.

Colonel Harris: I don't know, but I had a note in my own mind that it lacked one of having all the necessary permutations and combinations, and I will have to check it again and see, Judge.

The Court: Suppose counsel for the defendants prepare a form and counsel for the plaintiffs prepare a form.

Colonel Harris: All right, sir.

The Court: Tomorrow we can iron that out.

Colonel Harris: If we meet at 9:30 we won't have much time to get any typing done. Are you going to meet at 9:30 in the morning?

The Court: I had planned to meet at 9:30.

Colonel Harris: All right, whatever Your Honor says.

The Court: Do you think we can arrange this now?

Colonel Harris: I would rather have a stenographer whenever I start to write something, Judge, if that is agreeable with you all.

The Court: All right.

Mr. Mullen: Does that complete yours?

The Court: There were some rewritten. I guess we had better go back over those.

No. 1 was to be rewritten.

Mr. Robertson: We went back to No. 1 as originally offered yesterday.

The Court: This is the same as you offered originally.

Mr. Robertson: Yes, because we had the statute paraphrased in another place, you remember.

Mr. Mullen: I thought the Court ruled on that.

The Court: I have a memorandum here—I am not certain about it—that the statute would be quoted in No. 1.

Mr. Allen: That is right. We have one on that.

Mr. Robertson: I have, but I think it is No. 5.

Mr. Allen: No. 5 isn't the one that quotes the statute. The first one was.

Mr. Pollard: This is a rewrite of your No. 1, is it?

Mr. Robertson: It is a rewrite of 2 that I just passed to you.

Mr. Mullen: I understood the Court ruled on No. 1.

Mr. Allen: The Court ruled on No. 1, as I re-
page 2313 } call, that you can just simply quote the statute.

The Court: That is my recollection.

Mr. Robertson: Here is what happened, Judge. You are correct that we offered it as I am now offering it, and there was a lot of discussion here that the statute ought to be quoted. We said all right we would quote the statute and withdraw that one. Then when we went along later into the discussion of our instructions we came to one where we paraphrased the statute, and they said we ought not both to paraphrase the statute and quote it verbatim. I said in that event I would stick to the paraphrasing of the statute and withdraw the direct quotation of the statute, and we offer that first one. I will come back to it in a minute and it will clarify itself.

No. 3 was not to be rewritten.

The Court: What about No. 2 now? You have No. 2 rewritten.

Mr. Robertson: I gave that to you.

(Plaintiff's Instruction No. 2 (rewrite) follows:)

"The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, who were not members of the United Construction Division of District 50, United Mine Workers of America, or District 50, United Mine Workers of America, or United

page 2314 } Mine Workers of America without threats of
violence or acts of violence against such men, or
intimidation of such men by anyone to induce
such men to join United Construction Workers."

Mr. Pollard: May I ask you a question about No. 2. Is it the same as your original No. 2 except that Hart and his men" has been changed to "anyone"? Any other changes?

Mr. Robertson: I may have said the Division. I don't know. Let me read it back and see. I think I corrected the name to United Construction Workers Division of District 50, United Mine Workers of America, District 50, United Mine Workers of America, and United Mine Workers of America.

I made those conform in all instructions here unless I tripped up somewhere and failed to do it. I intended and tried to do it.

Mr. Pollard: I understood Your Honor that you granted instruction No. 2 as offered with the exception that you substituted the word "anyone" for "Hart and his men."

I don't think the plaintiff has any authority to make any change in the instruction as granted by the Court.

Mr. Robertson: If you don't want it that way, I will write it again. I thought you would want it to conform to that wording all the way through. The judge said that was the correct wording.

The Court: What difference would that make, Mr. Pollard?

page 2315 } Mr. Pollard: It has been our contention all along, Your Honor, that whenever any of the plaintiff's are mentioned, they should be referred to as they were referred to in the instruction No. 2 as offered when the defendants are referred to by name in instructions.

Mr. Allen: Your Honor, will you recall that when that question arose we went to the interrogatories and got the answer which they said properly described and stated it, and we took the names exactly as they said they should be properly stated. We tried to conform to that in all the instructions.

Mr. Robertson: If we hadn't done it, they would have objected.

Mr. Mullen: Do you have a copy of it as rewritten?

Mr. Robertson: I gave Fred four of them.

Mr. Allen: You have that one.

The Court: We have passed by No. 1 for the time being. I don't think it makes much difference one way or the other, gentlemen. I will grant No. 2 as offered.

Mr. Mullen: We object to it as offered and note an exception.

The Court: Yes, this is No. 2. I am going to destroy the old No. 2.

Mr. Robertson: No. 3 was not rewritten.

Mr. Allen: That was granted as it was.

page 2316 } Mr. Robertson: Here are four copies of No. 4.

(Plaintiff's Instruction No. 4 (rewrite) follows:)

"The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done within the scope of their authority or employment. An agent is one who by

the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons.

"It is admitted that William O. Hart and David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case; but it is for you to say whether they were than also agents of United Mine Workers of America, and whether during that period of time they committed the acts charged against them within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them."

The Court: You have eliminated the last two paragraphs. That is the only change.

Mr. Pollard: Those are the only changes. Mr. Robertson?

Mr. Robertson: As far as I recall, unless I changed the names to make them correct. I changed them to page 2317 } make them correct in No. 5, which is coming up now.

Mr. Pollard: We don't have to except again at this point.

The Court: If you want to, if there is any change, I don't think you would have to except.

Mr. Mullen: We excepted to it at the time it was to be rewritten.

Mr. Robertson: Here is No. 5.

(Plaintiff's Instruction No. 5 (rewrite) follows:)

"The Court instructs the jury if you believe from the evidence that the acts complained of were committed, and that during the period in which they were committed, United Mine Worker of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of District 50, United Mine Workers of America, while acting in the line and scope of their employment and in the course of their principals' business."

Colonel Harris: I want to add an additional objection to that, that we didn't state the other day.

The Court: All right, Colonel.

Colonel Harris: This would make the United page 2318 } Mine Workers responsible for every conceivable thing that might be done by an agent of District

50 and of the United Construction Workers, whether they were doing it in an effort to organize the unorganized or not. That is all-embracing and just makes the United Mine Workers responsible for everything an agent of the other two unions do.

Mr. Robertson: Judge, it is the best I could do according to what the Court ruled yesterday.

The Court: Let me read this instruction again.

Mr. Robertson: Read it out loud, will you, Judge?

The Court: "The Court instructs the jury if you believe from the evidence that the acts complained of were committed, and that during the period in which they were committed United Mine Workers of America was using District 50 United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in business other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, while acting in the line and scope of their employment and in the course of their principals' business."

Mr. Allen: Does that meet the objection, Mr. page 2319 } Pollard, that you made here the other day?

Mr. Pollard: Which one was that? Which objection?

Mr. Allen: I understood you to object to that instruction yesterday upon the ground that that permitted the jury to find against the United Mine Workers without finding against District 50 or United Construction Workers, and that that was the objection you offered to the instruction.

Mr. Pollard: Yes, sir.

Mr. Allen: Is that right?

Mr. Pollard: I want to make sure we are talking about the same one (examining document).

No, sir, that does not meet that objection.

The Court: As I see it, it is the same instruction that we had yesterday—

Mr. Robertson: No, sir.

The Court: —with a change in the names.

Mr. Robertson: Here is the sheet I worked from.

The Court: Mr. Allen suggested he was going to rewrite this to meet the objection of Mr. Pollard, as I recall it. Is that your understanding?

Mr. Allen: I did write one Your Honor, and here it is. I think that meets the objection.

Mr. Robertson: There are the notes from which I wrote it.

The Court: Mr. Allen made the statement page 2320 } that he was going to rewrite it.

* * * * *

Mr. Pollard: This is offered as No. 5? Which one of these are you going to offer?

Mr. Allen: We are offering this one.

Mr. Pollard: You are withdrawing this No. 5 that Mr. Robertson just passed on?

Mr. Allen: Yes. You said that didn't meet the suggestion you made yesterday.

(Mr. Allen's rewrite of Plaintiff's Instruction No. 5 was not furnished to the reporter.)

Mr. Mullen: You have enlarged it.

Mr. Allen: This was necessary to meet Mr. Pollard's objection. As I understand Mr. Pollard's objection, as it was drawn before it provided for a verdict against United Mine Workers without a verdict against District 50 and United Construction Workers. In order to correct it, to carry into effect his ideas, we had to rewrite it and add a considerable amount to it.

Mr. Mullen: One thing, the jury won't know what you are talking about. They can't keep up with it.

Mr. Allen: Do you want to read it?

Mr. Pollard: Mr. Allen, it doesn't seem to page 2321 } meet my objection, sir.

Mr. Robertson: Does or does not?

Mr. Pollard: Does not.

Mr. Allen: Let's read it and see.

Mr. Pollard: To meet my objection all you have to do is to add to No. 5 as offered, to say "provided you shall first have found the other two defendants liable," or something to that effect.

Colonel Harris: He is not talking about the long one, but the other one.

Mr. Pollard: The one which you just threw away.

The Court: I didn't tear it up.

Mr. Robertson: I think I can fix that. Judge, get the short one back. Listen to this, Fred, and see if this doesn't meet it. Are you ready?

The Court: Yes.

Mr. Robertson: "The Court instructs the jury if you believe from the evidence that the acts complained of were com-

mitted and that during the period in which they were committed United Mine Workers of America was using District 50, United Mine Workers of America, and United Construction Workers Division of District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Construction Workers Division of District 50, United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America are all liable for any wrongful acts of the agents and employees—" I have it transposed there. It ought to be "United Construction Workers, Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America while acting in the line and scope of their employment and in the course of their principals' business."

I think that is it and meets the objection. I think it is better because it is not so long. They have it transposed. In order to keep the same sequence I ought to put United Construction Workers ahead of District 50 in both places to keep it in the same order.

Mr. Allen: In other words, that would be shaped so that they can't find against United Mine Workers of America without finding against the United Construction Workers and District 50.

Mr. Robertson: If they find against anybody, under this instruction they have to find against all three.

Mr. Pollard: You should say in there in the third line from the end, before "while acting" should be "and if you further believe that such acts were committed while acting."

Mr. Moore: That is up at the top.
page 2323 } The Court: I think you start off with that.

Mr. Pollard: "Committed while acting within the scope of their authority."

The Court: "if you believe from the evidence that the acts complained of were committed."

Mr. Robertson: "—and that during the period in which they were committed United Mine Workers of America was using District 50"—I would rather change the sequence of it. Heretofore we have been naming United Construction Workers Division and then District 50. I would rather keep the same sequence of it.

Mr. Allen: If it please Your Honor, may Mr. Robertson dictate it to the reporter right here in the presence of everybody and see if we agree on the form of that? Of course I know they object to the substance.

Mr. Mullen: I think there should be a change at the very

first. "The Court instructs the jury if you believe from the evidence that the acts complained of were committed," "that the alleged acts complained of were committed."

Mr. Robertson: All right.

Mr. Pollard: Your Honor, I suggest that perhaps the easiest thing to do is for Mr. Robertson to take another try at it, and we will look at it in the morning.

Mr. Allen: It may come back here in the morning. We don't want to go on our instructions again in the page 2324 } morning. We want to take up yours.

Mr. Robertson: I can fix it in two minutes. Let me dictate it to the reporter.

Mr. Pollard: We can't look at it when he dictates it to the reporter. He told us to throw the copies away, and we threw it away. I don't know where we are, Judge.

Mr. Robertson: That suits me. I will rewrite it and bring it up in the morning.

The Court: Very well.

Mr. Robertson: I do submit when you get to the "acts complained of"—

Mr. Allen: The "acts complained of" stands in the place of "alleged acts." If you are going to say "alleged acts" cut out "complained of."

Mr. Lowden: If you believe the acts were committed.

Mr. Robertson: No. 6 is withdrawn.

The Court: For the sake of the record, we have been talking about No. 6 and No. 7. It may be better if a number is withdrawn, just to leave it withdrawn. And go on to No. 7.

Mr. Allen: In this No. 7 we have made an attempt to rewrite it.

(Plaintiff's Instruction No. 7 (rewrite) follows:)

"The Court instructs the jury that while employees may, free from restraint or coercion by employers or page 2325 } their agents, associate collectively for self-organization, and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare, and may, collectively and individually strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, neither employees nor associations, organizations nor groups of employees, have the right to resort to violence, intimidation, threats or coercion.

"If you believe from the evidence that William O. Hart, was acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District

50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, and if you believe from the evidence that while he was so acting he went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men to organize plaintiff's employees, and if you believe from the evidence that he was then acting in furtherance of the business of all three defendants, and if you believe from the evidence that while so acting he, by intimidation, threats, acts of violence, or coercion, caused plaintiff's workmen to leave their jobs, and put them in such fear as to cause them to refuse to return to work thereafter, you will find for the plaintiff against all three defendants and assess plaintiff's damages. page 2326 } ages in accordance with the instructions on damages."

The Court: That seems to meet the changes I have on my penciled memorandum.

Mr. Pollard: Your Honor, may I make an objection that wasn't made yesterday?

The Court: Yes.

Mr. Pollard: After the word "thereafter" which is in the third from the last line I suggested yesterday that there be added after that "and if you further believe that such acts caused the alleged damage to the plaintiff." I think what I properly should have requested was "and if you further believe from the evidence that such acts caused the alleged injury to the plaintiff," not damage, and the reason for that, as I stated yesterday, is that this is a finding instruction and must cover every possible theory of the case.

Mr. Robertson: He has already ruled on that.

Mr. Pollard: No, he ruled on it as to causing the plaintiff damage. They must find that this act or these acts were the sole cause of the plaintiff's injury if this is to cover every theory of the case, these acts must be the sole cause of the injury.

Mr. Robertson: It was all argued yesterday.

Mr. Allen: It was all argued yesterday and the instruction refers to the instruction on damages, and all of that is covered in the instruction on damages. You page 2327 } can't put all the conditions in every instruction.

The Court: This instruction does refer to other instructions.

Mr. Robertson: We went over all of it yesterday.

Mr. Allen: That very point.

Mr. Pollard: Judge, I don't wish to argue it any further.

The Court: I understand. You just wanted to get your objection in.

Mr. Pollard: No, I just wanted to make it plain that this instruction is erroneous unless the jury finds that all these other facts were the sole cause of the injury.

Mr. Robertson: You made your point yesterday. It is all in the record.

Mr. Allen: That has no business in this instruction. It is in the damage instruction.

The Court: I will give No. 7 as redrafted.

Mr. Mullen: We object to No. 7 as given and reserve an exception.

Colonel Harris: I want to add the additional objection there, if the Court pleases, that we are not responsible for anybody's conduct except Hart's.

Mr. Allen: What?

Colonel Harris: We are not responsible for anybody's conduct except Mr. Hart's, and this makes us page 2328 } responsible for anybody in that crowd.

The Court: Do you gentlemen have any observations to make in regard to that?

Mr. Robertson: We went over it yesterday. We went over the whole theory of the case.

The Court: I don't know that you mentioned that yesterday, did you?

Colonel Harris: I don't recall it.

Mr. Robertson: It is all through the case, Hart and his crowd. They say they came to a pink tea party, and we say they came as a mob. They denied that he brought them. They all came along together.

Mr. Allen: Hart testified that he went and got them. Of course he didn't claim he brought as many as we claim. He said he brought between 20 and 30 only.

Mr. Lowden: He didn't say that. That is what he took to the schoolhouse.

Mr. Robertson: That is what he came by the schoolhouse with.

Colonel Harris: Suppose he asked 49 peaceful men and he is expecting the fiftieth one to be peaceful, too, and the fiftieth one proves to be a bad egg, we wouldn't be responsible for it unless he had a reasonable cause to believe that he would be a bad egg.

Mr. Robertson: There is no such evidence as page 2329 } that in here either.

Mr. Allen: He could test his eggs a little better than that.

The Court: I will give it as revised, gentlemen.

Mr. Pollard: We again except.

The Court: The exception is noted.

Mr. Robertson: 8, 9, 10, and 11 were all to be rewritten. Here is the 1-A that they asked about.

(Plaintiff's Instruction No. 1-A follows:)

"The Court instructs the jury that Baldwin's Revised Statutes of Kentucky (1948) provides as follows:

" 'Section 336.130.

" '(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

" '(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion.'

page 2330 } " 'Section 437.110.

" '(1) No two or more persons shall confederate or band themselves together for the purpose of intimidating, alarming, disturbing or injuring any person.' "

Mr. Robertson: Mr. Lowden says there is a correction on it, and that last section of the code is added, not what we read to the Court yesterday.

Mr. Lowden: Section 437.110.

The Court: What instruction number is this?

Mr. Lowden: That is the one they said they wanted, all the law of Kentucky.

Mr. Robertson: We offer that in addition to No. 1. They said they wanted this.

Mr. Pollard: That is not the ruling you made yesterday. There was nothing mentioned about Section 437.110.

Mr. Robertson: We are doing it like you did a moment ago. We are bringing that new section to the attention of the Court.

Mr. Mullen: 437 is the communist and Ku-Klux-Klan statute and doesn't relate to this. It is not a part of this.

Mr. Lowden: Do you want me to read you a couple of cases about the United Mine Workers under it?

Mr. Moore: Miners have been convicted under it.

Mr. Lowden: I am hoping to do that.

The Court: Is this the section we were talking about in No. 1 yesterday?

Mr. Robertson: The first one is, yes, sir.

The Court: The first one, Section 336.130. That is the section.

Mr. Robertson: That is the one we were talking about yesterday. The other one is new. Mr. Lowden will discuss that.

Mr. Lowden: I just wanted to make it plain that that part of it is not all, and I am perfectly willing to put it all in. The girl made a mistake in typing it. To show its applicability to this case, Judge, I will read you the case.

Mr. Pollard: Your Honor, before Mr. Lowden gets on that, there is no allegation in the complaint of any confederation or of any banding together for an unlawful purpose.

Mr. Mullen: This relates to conspiracy.

Mr. Lowden: I think there is.

Colonel Harris: The first two paragraphs only were what we were talking about yesterday.

Mr. Lowden: I don't think that they have any right to tell us that we can't put in all the statutes in our own instructions.

Mr. Pollard: Not in the world, but the Judge has already ruled on it.

Mr. Robertson: He hasn't ruled on this because, just as he said a moment ago when he brought up something, when Colonel Harris brought up something, Section 437.110 was not mentioned yesterday.

Mr. Pollard: That is right, and the Judge made his ruling.

The Court: The first I heard of it was this afternoon.

Mr. Robertson: That is right.

Mr. Pollard: What was that case up there in Luray?

(No response.)

Mr. Lowden: Judge, I would like to read a part of a case. There have been several in which the United Mine Workers have been involved under Section 437.110, and there is one here, *Commonwealth v. Ramey*, a criminal statute, 279 Ky.

810, 132 S. W. (2d) 342, 1939. The court stated the evidence in this case as follows:

"The evidence is further that on the particular occasion complained of, Joe Smith and Ersel Ratliff upon going to the mine for the purpose of returning to their jobs, were met at the mine entrance by the appellee, Ramey, and his associate union miners, who undertook to first persuade them not to work in the mine, but that, upon their refusal to yield to these pickets' lawful, persuasive inducements not to return to work and their manifestation of a continued will and intention to enter the mine and return to their jobs, as testified by Ersel Ratliff, the appellee Ramey climbed upon a pile of ties, 'from which he addressed and harangued his union associates and pickets substantially as follows: Members of the United Mine Workers, you heard what that man (Ersel Ratliff) said. He says he ain't going off nor ain't going to join the check-off. Are we going to let a man come in here and scab on us?' Further witnesses testified, they all said 'no.' He (Ramey) says 'I will ask two good men to step up here and take these boys off the hill', and Orison Potter stepped up in front of me and Davis Stepleton in front of Joe Smith and I told them 'I have got a right to work here,' and they said no I didn't, they were on strike there, * * * that I had to join the union or not work and he (Ramey) told them the time was up, for to take us off, and Lee Ad Swinney (an uncle of Joe Smith's) spoke up and said, 'You won't have to take Joe off. I will send him off', and I told them 'Well, just let us stay around here then', and they gauged up on us and then I told them that rather than have any trouble I would go off myself."

The case came up on a question whether or not that was sufficient evidence to go to the jury to support a conviction under that statute. The Supreme Court of Appeals of Kentucky or whatever they call it, said it was and said the following:

"It may be conceded that the defendants had the right to make a concerted effort to win their strike, by using all persuasive means with the employees of the mine to get them to abandon their jobs and not return to work during the strike, for the reason that their resort to and exercise of such persuasive and legal means was but incidental to the full exercise of their conceded and clearly established right to strike for the improvement of their condition with respect to hours, labor, wages,

and so forth. But while picketing may be lawfully done, as stated, it may also mean, as it is often conducted, the banding and assembling of men at or near the plant of the employer for the purpose not of peaceful persuasion alone, but for the purpose of coercing, threatening or intimidating and turning aside their will those who would go to and from the picketed plant to work or seeking work in which instances picketing employing such methods is generally held to be unlawful and to constitute such action and conduct as come within the ban of the statute condemning as a crime the act of confederating and banding together for the purpose of intimidating, alarming, and so forth, a person or persons.

As said in 16 R. C. L., Section 33, page 454: 'The decision of the question whether picketing is lawful or unlawful depends upon the circumstances surrounding each case.' "

page 2334 } Mr. Mullen: What is the style of that case?
Mr. Lowden: *Ramey v. Commonwealth*.
Mr. Mullen: When was it decided?

Mr. Lowden: 1939.

Mr. Mullen: Before the Blandford case.

Mr. Pollard: That is a criminal case, Your Honor.

Mr. Lowden: Sure it is a criminal case.

Mr. Pollard: The criminal law has no place in the instructions in this case.

Mr. Allen: Criminal law prescribes conduct. If a man violates that conduct he is liable under both.

Mr. Mullen: There is no charge of criminal acts in this suit.

Mr. Allen: But the fact that an act may be a criminal act does not deprive the act of its character of violating a civil right. In almost every case criminal conduct is violative of a civil right.

Mr. Pollard: The question in this case is whether or not—

Mr. Robertson: We will withdraw the second statute. It is a criminal thing. We think it is all right.

Mr. Pollard: All right. Just that section.

Mr. Robertson: We are offering No. 1 as we offered yesterday. You wanted us to offer this. We offer this, too, in addition.

Mr. Pollard: What number are you offering this as?

page 2335 } Mr. Robertson: You wanted it, we will let you number it. It can be 1-A.

The Court: This would be 1-A?

Mr. Robertson: Yes.

The Court: Doesn't 1-A include No. 1?

Mr. Robertson: Not in our language to which we think we

are entitled, Your Honor. They said they wanted the statute. If they want the statute, we want both.

The Court: If No. 1 is included in No. 1-A, I fail to see the necessity to grant No. 1. I will give 1-A and refuse No. 1. Do you want to say something?

Mr. Moore: I thought you ought to put our No. 1 in here to pin it right down to the facts of this particular case. They have been talking about strike and picketing all the way through.

Mr. Robertson: Judge, let me do this between now and tomorrow morning. I withdraw the second statute. It is a criminal statute. I want to satisfy myself whether or not we have the right to use it. I would like to have overnight to go over that question.

Mr. Mullen: When are you going to finish yours?

The Court: We have to get to the jury sometime.

Mr. Robertson: Then I offer it as it is now. I think I have a right to offer it, but I am not dead sure.

Mr. Allen: I am satisfied we have a right to page 2336 } that statute.

Mr. Mullen: One minute you offer it and the next you don't.

Mr. Robertson: All right, I offer it as it is presented and written.

Colonel Harris: It doesn't correctly quote the statute. It doesn't give all of the statute.

Mr. Robertson: We are perfectly willing to put the part in there about going to the penitentiary if you want to.

Mr. Pollard: Your Honor, we have nothing more to say on the question and will abide the ruling of the Court, with the right to except.

Mr. Robertson: May I make one comment?

The Court: Yes.

Mr. Robertson: You remember the traffic thing in Virginia about reckless driving, which imposes the police penalty. It is customary in all these tort cases in Virginia, in bus and streetcar cases, to cite the statute prohibiting and giving a definition of reckless driving, but you leave out the part that "whoever violates the statute is guilty of a misdemeanor." It seems to me that this is the same thing. Here is a statute that says that these things cannot be done, and then it has another thing following along that says if you do it you go to the penitentiary. Therefore, we leave it out here.

Mr. Mullen: That is contradictory of what page 2337 } goes before which says you can assemble in a crowd.

Mr. Allen: What is that?

Mr. Mullen: It is absolutely contradictory of what goes before. It is contradictory of the statute.

Mr. Robertson: No, it isn't. It says "for the purpose of intimidating." You can't combine or confederate for the purpose of intimidating, alarming, disturbing, or injuring.

Mr. Mullen: It includes the words "engage in peaceful picketing and assemble collectively for peaceful purposes."

Mr. Robertson: Of course you can do that. This statute doesn't say you can't do that.

The Court: I will give you overnight to think that over, Mr. Robertson. As presently advised, the Court will refuse instruction No. 1 offered by the plaintiff, will grant Instruction No. 1-A, and will reserve its decision as to section 437.110 in 1-A.

Mr. Pollard: We got down through No. 7, Your Honor.

The Court: These gentlemen are going to rewrite No. 8, 9, 10, and 11.

Mr. Pollard: Before we adjourn, Your Honor, since this is going to be rewritten, may I offer this case page 2338 } in the consideration of Instruction No. 9, which the Court has tentatively ruled on, and I refer to paragraph (5) in there as to whether or not the plaintiff is entitled to an instruction on business relationship when there has been no evidence on it. I refer to the case of *Norfolk & Southern Railway Company v. Tom Linson*, reported at 116 Va. 153. At page 156 the Court said:

"Instruction (e) related to the measure of damages and the only objection made to it is that it told the jury that in assessing damages they might take into consideration 'such damages as will naturally reasonably and probably result to him (the plaintiff) in the future consequence of his injury, without confining them to the evidence about them as it was done in the instruction with reference to all other items of damage which they might take into consideration. It would have been better to have told the jury that future damages, like all other damages allowed, must be ascertained from the evidence before them."

Mr. Allen: I have nothing to say on that.

Mr. Pollard: We submit, Your Honor, since there is no evidence before them, then the instruction is improper as to reputation.

Mr. Robertson: That is what you argued before lunch, when you read from the testimony of Salvati.

Mr. Pollard: That is with relation to business relationship. This is with reference to reputation.

Mr. Robertson: It was with relation to the Island Creek Empire.

The Court: 9:30 tomorrow morning, gentlemen. We will have to stay here until we get through tomorrow. If it takes to midnight, we will just have to stay, but I am hoping we will get everything in a few hours.

Mr. Allen: All the questions involved in their instructions have been discussed and argued.

The Court: On No. 1 of course the Court always reserves the right to reserve his instructions, but that is the way I feel about it at the moment. I intend for it to be permanent, but I reserve the right to change my ruling.

(Whereupon, at 4:45 o'clock p. m. the conference was recessed until 9:30 o'clock the next day.)

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City Hall,
Richmond, Virginia,
Thursday, February 15, 1951.

Met in chambers, pursuant to recess, at 9:30 a. m.

Before: Hon. Harold F. Sneed.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also present: Robert N. Pollard and Williard P. Owens.

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PROCEEDINGS

Mr. Fred G. Pollard: This should be added to our instruction, Judge.

Mr. Robertson: Judge, I think you indicated that you were not going to give No. 1, the little short one, but that you were going to give this one.

(Plaintiff's Instruction No. 1-A (rewrite) follows:)

"The Court instructs the jury that Baldwin's Revised Statutes of Kentucky (1948) provides as follows:

"Section 336.130

"(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion.' "

Mr. Robertson: Then yesterday you were talking about that other statute, and we said we wanted time page 2342 } to look into it. We think we are entitled to it, so we have brought it up, just so we don't raise any new question. We have no new argument on it.

Mr. Fred G. Pollard: Do I understand you are offering this as 1-A without offering Section 437?

Mr. Robertson: I just said we are adding it as a separate instruction.

The Court: I have refused Plaintiff's Instruction No. 1. I am going to grant No. 1-A.

(Plaintiff's Instruction No. 1-B follows:)

"The Court instructs the jury that the Revised Statutes of Kentucky provides:

"437.110 *Conspiracy: banding together for unlawful purpose.*

"(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act.' "

The Court: Plaintiff's Instruction No. 1-B is offered this morning.

Mr. Mullen: We object to that.

The Court: I am going to pass that by temporarily. page 2343 }

Mr. Allen: Did I hear an objection to 1-A?

Mr. Mullen: It is merely a statement of the statute.

The Court: They are not objecting to 1-A.

I am going to pass 1-B by temporarily.

Mr. Robertson: You already have No. 2 there, I think.

The Court: I have granted 2 and 3.

Mr. Fred G. Pollard: I don't think you passed on No. 4 since it was rewritten.

The Court: Was 4 or 5 rewritten?

Mr. Lowden: You passed 4 yesterday.

Here it is.

The Court: It is passed, then.

You were going to rewrite 5.

Mr. Robertson: We rewrote 5. We have broken it up into two, to try to meet Mr. Pollard's objection.

Mr. Mullen: This is No. 5 that you have broken up?

The Court: Do you have a 5-A there?

Mr. Robertson: We also have a 5-A.

Mr. Lowden: Yesterday we had two 5's; one Mr. Allen wrote.

Mr. Robertson: No. 6 was withdrawn.

The Court: No. 6 was withdrawn.

Mr. Robertson: No. 8 has been rewritten.

It is on No. 9 that you had the suggestion.

page 2344 } The Court: This is rewritten to comply with the Court's ruling, is it not?

Mr. Mullen: Is No. 8 rewritten as allowed by the Court?

Mr. Robertson: Yes.

Mr. Mullen: What about No. 7?

The Court: That was rewritten yesterday.

Mr. Robertson: Here is No. 9. (Distributing copies.)

Mr. Fred G. Pollard: Your Honor, right much reading has to be done in connection with these rewritten instructions. Inasmuch as we have already spent two days on the Plaintiff's instructions, we submit that it might be proper to take up the Defendants' instructions at this time, and let us check the Plaintiff's instructions during lunch.

The Court: I am accepting their statement that they were rewritten as suggested by the Court yesterday; and if, during lunch, you check and find that they are not, of course, we will go into the matter further.

No. 10 is rewritten.

(Plaintiff's Instructions No. 8, 9, and 10, rewritten in accordance with the Court's instructions, follow:)

Instruction No. 8:

“The Court instructs the jury if you believe from the evidence (1) that William O. Hart was acting within the scope of his authority and employment and was acting page 2345 } for all the defendants for the purpose of ‘organizing the unorganized’, and (2) that in furtherance of that purpose he was going about Eastern Kentucky leading men to various job sites for the purpose of compelling by intimidation, coercion or force the workers on such jobs to join one of the Defendant unions, or failing that, to stop the jobs, and (3) that such activities of Hart were known or reasonably should have been known to the defendants, and (4) that in furtherance of this purpose Hart led men to plaintiff’s job site in Breathitt County for the purpose of compelling the employees of plaintiff to join one of the defendant unions, irrespective of such employees’ wishes, and (5) that Hart or others at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of plaintiff to ‘sign up’ with one of the defendant unions, and forced others to quit work, and (6) that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of Plaintiff, and with the express and avowed purpose of forcing plaintiff to recognize one of the defendant unions or failing in that, forcing the plaintiff to get out of the territory, then defendants are liable to plaintiff not only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court.”

page 2346 } Instruction No. 9:

“The Court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages, then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of

“(1) Profits under its contract dated December 15, 1948, with Spring Fork Development Company, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

“(2) Profits the plaintiff might have realized from alleged promised cost plus 5% contracts with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

"(3) Any loss, as defined in other instructions, to plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence such profits are reasonably certain as defined in other instructions; and

"(4) Any loss to plaintiff from impairment of plaintiff's business reputation.

page 2347 } "And you should return your verdict in such
amount of compensatory damages as defined in
other instructions on damages as will fairly and
fully compensate the plaintiff for any of the aforesaid losses
the plaintiff has actually sustained as a proximate result of
the wrongful acts of the defendants or any of them."

Instruction No. 10:

"The Court instructs the jury that damages recoverable in actions like this, in the event plaintiff is entitled to recover, are of two kinds: (1) compensatory damages, and, (2) punitive damages.

"(1) Compensatory damages are the measure of the loss or injury sustained and may embrace pecuniary loss suffered by the plaintiff, if any; a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their subsidiaries or associates, if shown by the evidence; and the profits which the plaintiff would have gained by a continuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty. The fact that such profits may be involved in some uncertainty and contingency and can be determined only approximately upon reasonable conjectures and probable estimates does not

page 2348 } necessarily mean that they cannot be recovered
at all. If it is certain that substantial damage
has been caused by the acts of the defendants
and the uncertainty is not whether there have been damages,
but only an uncertainty as to their true amount, then the jury
may not refuse all compensatory damages merely because of
that uncertainty. The plaintiff has a right to prove the
nature of his relationship with the coal companies, the cir-
cumstances surrounding the acts of the defendants, and the
proximate consequences naturally and directly traceable
thereto. If and when that is done, it is for the jury to deter-
mine the amount of compensatory damages to be awarded the

plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion.

"(2) Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or maliciously and with a design of injuring plaintiff in its business,

or where the wrongful act is accompanied by
page 2349 } insult, indignity, oppression, or threats, or
where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the amount claimed.

"If you should find that the plaintiff is entitled to both compensatory and punitive damages, you should find each class of damages separately; that is to say, you should award compensatory damages in one amount and punitive damages in another amount. Punitive damages need not necessarily bear any relation to the damages allowed by way of compensation, but punitive damages must bear some relation to the injury and the cause thereof.

"In order that the plaintiff may recover damages in this case, whether compensatory or punitive, or both, it is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing any acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable,
page 2350 } although they did not expressly authorize the
acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done."

Mr. Robertson: It was very hard to work No. 11, the form of verdict, out. We think we have it in acceptable form.

(Plaintiff's Instruction No. 11 (rewrite) follows:)

"The Court instructs the jury as follows:

"1. That if you believe compensatory damages should be awarded, you should be guided in your award as follows:

"(a) You can make only one total award of compensatory damages, for which award you should designate which defendants, if any, are liable.

"(b) You cannot find against U. M. W. A. for compensatory damages unless you also find against U. C. W. and District 50 for compensatory damages.

"(c) Your total award for compensatory damages cannot exceed \$.

"2. That if you believe punitive damages should be awarded, you should be guided in your award as follows:

"(a) You may award punitive damages in varying amounts against each defendant found to be liable for punitive damages or you may find one amount of punitive damages and designate the defendant or defendants jointly liable therefor.

"(b) If you make awards of punitive damage 2351 } ages in varying amounts the total of such awards may not exceed \$.

"(c) If you make one award of punitive damages and designate one or more defendants jointly liable therefor, the award cannot exceed \$.

"3. The award of compensatory damages if any awarded, plus the award, if any, of punitive damages cannot exceed \$500,000.00.

"4. When you have reached a verdict, the court will upon request aid you in putting your verdict into a proper form."

The Court: Did you gentlemen prepare an instruction on the verdict?

Mr. Mullen: It seems to me that that is strictly an instruction from the Court simply for the convenience of the jury, and it ought to be all in one.

The Court: I think that is right. I thought maybe you had some suggestions and we could combine them; but what we can do, we can go over this instruction. We might delay it until after we have finished with Defendants' instructions, and pass on the instruction later.

Mr. Allen: If you find for the Defendants, say so, and no more. I reckon you want that in there.

Mr. Mullen: That would be accepted.

Mr. Fred G. Pollard: We will let the jury decide that. page 2352 }

The Court: If we could take up No. 5 and get that behind us, then we could proceed with the Defendants' instructions.

(Plaintiff's Instructions Nos. 5 and 5-A follow:)

Instruction No. 5:

"The Court instructs the jury if you believe from the evidence that United Mine Workers of America was using United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business, then United Mine Workers of America is liable for any wrongful acts of the agents and employees of United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, while those agents were acting in the line and scope of their employment for the purpose of organizing the unorganized."

Instruction No. 5-A:

"The Court instructs the jury if you believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, Division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job page 2353 } site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, then you will find for the plaintiff against the two defendants, District 50, United Mine Workers of America, and United Construction Workers, division of District 50, United Mine Workers of America, and assess plaintiff's damages in accordance with the instructions on damages.

"And if you further believe from the evidence that William O. Hart, as a representative of District 50, United Mine Work-

ers of America, and of United Construction Workers, division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, and that at that time District 50, United Mine Workers of America, and United Construction Workers,

Division of District 50, United Mine Workers of
page 2354 } America, or either of them, were agents of United
Mine Workers of America for the purpose of
organizing workers in businesses other than the coal mining
business, then you shall also find for the plaintiff against the
defendant, United Mine Workers of America, and assess the
plaintiff's damages in accordance with the instructions on
damages."

Mr. Robertson: We will have to take 5 and 5-A together.

Mr. Fred G. Pollard: Your Honor, 5-A—

Mr. Lowden: Let's take up 5 first.

Mr. Fred G. Pollard: No. 5 still doesn't meet the objection we made.

Colonel Harris: And there is an additional objection.

Your Honor will notice the last two lines, "while those agents were acting in the line and scope of their employment for the purpose of organizing the unorganized." You notice that charge has an agent of an agent. On that account, the agent of the agent must be acting in the line and scope of his employment, and the agent back of him must be acting in the line and scope of his employment. This allows a break in the chain of responsibility by merely having an agent of an agent acting in the line and scope of his employment, but his immediate principal may have departed from the line and scope that he was hired to do. Do I make my—
page 2355 } self clear to the Court?

The Court: I see what you are talking about.

Mr. Fred G. Pollard: Which also goes to the same idea and objection we made, that they first must find District 50 and United Construction Workers liable. That is still not in here.

Mr. Moore: That is in 5-A.

Mr. Fred G. Pollard: It is not in here.

Mr. Robertson: Are we going to proceed like we did yesterday?

The Court: Yes, we will proceed like we did yesterday.

Mr. Allen: You go ahead and make your objection.

Mr. Fred G. Pollard: That is the objection.

Mr. Mullen: I don't believe 5-A clarifies it at all. I think it just adds a lot of cumbersome language that doesn't meet the point at all.

Mr. Robertson: Are you through?

Mr. Fred G. Pollard: Do you want to finish No. 5, or do you want to take up 5-A, also?

Mr. Robertson: I thought we were going to take 5, and then go on to 5-A. It doesn't make any difference to me.

The Court: Let's take up one at a time.

Mr. Fred G. Pollard: That is all on No. 5.

Mr. Robertson: Just to read the thing once:

page 2356 } "The Court instructs the jury if you believe
from the evidence that United Mine Workers of
America was using United Construction Workers Division of
District 50, United Mine Workers of America, and District
50, United Mine Workers of America, as agents for the pur-
pose of organizing the unorganized in businesses other than
the coal mining business," that is, if it was using those two
agents, "then United Mine Workers of America is liable for
any wrongful acts of the agents and employees of United Con-
struction Workers Division of District 50, United Mine Work-
ers of America, and District 50, United Mine Workers of
America, while those agents were acting in the line and scope
of their employment for the purpose of organizing the un-
organized."

That is intended to put forth one clean-cut proposition that if the parent organization is using both of its subordinates for its purposes through agents acting within the scope of its authority, then it is responsible for their acts. That is one clean-cut, simple proposition in one instruction, that is intended only to put forth that one thought. Then 5-A comes along to the next thought.

The Court: We will take up 5-A.

Mr. Fred G. Pollard: No, 5-A, the first paragraph in there, as far as I can determine, is the same as the second paragraph in the 7th instruction. It is nothing but duplication.

Of course, the suggestion that we have made on
page 2357 } other instructions, that where you have a finding
instruction you must find that it is the sole cause
of the plaintiff's injury, is left out.

Do you have any other thoughts, Colonel?

Colonel Harris: That also is subject to the defect on agency. He doesn't have the agency go all the way through. As I understand it, all the other objections that we made to this 5 are repeated without dictating them back.

The Court: That is the understanding of the Court.

Have you gentlemen any further observations to make?

Mr. Fred G. Pollard: I think of none.

Mr. Mullen: Except that 5-A and 7 are duplications.

Mr. Allen: No, they aren't duplications.

Mr. Mullen: The last paragraph in 7 covers the same subject as 5-A.

The Court: All right, Mr. Allen?

Mr. Allen: If Your Honor please, 5-A is designed to tell the jury two things: First, if the United Mine Workers was using United Construction Workers and District 50 as agents for the purpose of organizing the unorganized, and Hart went to the Plaintiff's job site within the scope of his agency for District 50 and United Construction Workers and committed these wrongful acts, then United Construction Workers and District 50 are liable. Then the other part of it deals with

the liability of the United Mine Workers, if they
page 2358 } still believe those things set forth in the first
part of the instruction, to meet Mr. Pollard's
objection that the jury couldn't find against the United Mine
Workers without also finding liability on the part of Hart,
that is, that Hart and the men immediately and directly represent the United Construction Workers and District 50. That theory of the law is correct. We are relying, as we are, on this instruction, and this instruction is the only one that puts that situation up to the jury, that if District 50 and the United Construction Workers were being used by the United Mine Workers as agents for accomplishing the purpose of organizing the unorganized, and Hart went there within the scope of his employment and agency of District 50 and United Construction Workers, then the United Construction Workers and District 50 would be liable; and if the jury further believes so-and-so, and so on, then United Mine Workers would be liable.

Under that instruction, they can't find against the United Mine Workers without also finding against District 50 and the United Construction Workers. That is the only instruction which puts that situation up to the jury. We think it is correctly drawn to carry out that object.

Mr. Pollard interposed another objection, and that was that these acts of Hart must be alleged or shown to have been the sole cause of the plaintiff's damages. That principle has no

application whatsoever here. It is applicable in page 2359 } tort cases where the plaintiff is guilty of contributory negligence, and that negligence contributes to the injury, where it is in part a cause of his injury.

Here the principle couldn't possibly apply, because these men came there after Mr. Bryan had done whatever they claim he did. We are going to show in argument on subsequent instructions that everything Mr. Bryan did was perfectly all right under the law. But assuming, for purposes of argument on this instruction, that Mr. Bryan should have bargained with Hart and didn't do it, there is no connection whatsoever on the contributory negligence feature or any other feature which makes anything that Mr. Bryan did in part a cause of the injury or excuse them for the high-handed acts which they did after Mr. Bryan's acts were completed.

The Court: Do you gentlemen have any other observations?

Mr. Mullen: If Your Honor please, the objection that Mr. Pollard made, that they couldn't find against the United Mine Workers unless they found against the United Construction Workers, could be cured by another sentence. Here they come armed with a two-page instruction when one sentence would cure the thing in No. 5.

Mr. Lowden: In Instruction No. 11, which is the one submitted this morning covering the verdict, the jury is instructed that it cannot find against the United Mine Workers unless it first finds against the other two.

Mr. Mullen: I thought you all had finished.

Mr. Lowden: Finished what?

Mr. Mullen: I thought you had finished your argument on it. We want some time to go through ours.

Colonel Harris: There is one objection I want to add to that, if the Court please. This Instruction No. 5, leaving out any question of 5-A, is not predicated upon liability for damages that are proximately caused. This is just the bald statement that they are liable for any wrongful acts.

Mr. Allen contends that our objection that it is not the sole cause is not good, but if that objection is not good, certainly the one that the damages must be proximately caused before there is liability is a correct statement of law, and ought to be there.

Mr. Fred G. Pollard: Not only damages but injuries.

Colonel Harris: Yes, for injuries proximately caused.

The Court: Where do you suggest that that be added?

Mr. Fred G. Pollard: We have suggested that on all of

these instructions. We would have to stop and go through all of them.

The Court: I am talking about Instruction No. 5.

Mr. Lowden: Not on this particular one, but page 2361 } on all of them—I think I am right about this—

my understanding is that these are our instructions, and these gentlemen can protect the point they are talking about by offering an instruction of their own, to which we would have no objection. I don't think they have the right to come here and make up put their instructions in ours. If they want all this about proximate cause and the sole cause, they ought to have an instruction of their own.

Don't you agree with that?

Mr. Allen: Yes.

Mr. Mullen: It is rather a new doctrine. I think we have a right to object so that the instruction may correctly state the law. If you state it partially, we certainly have the right to have it corrected.

Mr. Robertson: You haven't any right to make us tell the whole law of the case in one instruction. It can't be done.

page 2362 } The Court: Gentlemen, I note in Instruction 11, which I have not read in full, which was presented to the Court this morning, under 1(b) "You cannot find against UMW for compensatory damages unless you also find against UCW and District 50 for compensatory damages."

Do you gentlemen have anything further to say?

Mr. Pollard: We have nothing further.

The Court: Colonel, do you have anything further to say?

Colonel Harris: I just wanted to reinforce what Mr. Mullen said. I understood the purpose of our meeting was for us to point out the defects in requested instructions. Then if they want to stand on the defective instructions that is their problem. All we have been doing is doing our best to point out the defects.

The Court: I understand.

Gentlemen, the Court will grant Instruction 5 and Instruction 5-A.

Mr. Mullen: We except to the ruling of the Court in granting Plaintiff's Instructions 5 and 5-A for the reasons stated in the argument on same.

The Court: Now we will proceed to consider the instructions offered on behalf of the defendants. Since we have numbered the plaintiff's instructions, I am wondering if it

wouldn't be a good idea to letter the defendants' page 2363 } instructions.

Mr. Pollard: For purposes of argument it may be easier, Your Honor, just to continue the numbers.

The Court: We may do this, start with 11 instead of 1 on the defendants and number all the instructions.

Mr. Mullen: We can make it A, B, and C.

The Court: All right, Defendants' Instruction A.

Mr. Robertson: If Your Honor please, that instruction reads as follows:

"Since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive rights of the parties in this case, and the law of Kentucky includes the Constitution of the United States, the applicable Federal laws, the statutes of Kentucky and the decisions of the court of last resort of Kentucky."

We think that that instruction is improper here and should not be given for these reasons:

The law of this case, it doesn't make any difference where it came from, is the law as the court gives it to the jury. It doesn't get the jury anywhere or help them in reaching a decision to tell them that it is the substantive law of Kentucky which applies.

Then when you get to the latter part of that instruction, the law of Kentucky includes the Constitution page 2364 } of the United States," it doesn't in this case.

There is no federal question here. They have tried their best to inject a federal question into this case. None arises from the notice of motion for judgment. None arises from the evidence.

"* * * the applicable federal laws." I recognize that is put in there to try to lug in the Norris-LaGuardia Act, which by its terms says it applies only to federal courts, or the Taft-Hartley Act which has no place in this case, or the Sherman Antitrust Act or the Clayton Act. None of them have any part in this case.

"* * * the statutes of Kentucky." Of course that would mean the whole code of Kentucky, which of course can't be true.

"* * * and the decisions of the Court of last resort of Kentucky." There is a whole body of law which can't possibly apply here.

It looks to us that that is trying in that instruction to put

down a springboard from which they can jump to arguments on all sorts of irrelevant things in the case.

Do you have anything to add?

Mr. Allen: If Your Honor please, you can prove the law of another state in the several ways provided by Virginia statutes. If the law of Kentucky is brought here and copied in one of these instructions or any sheet of paper page 2365 } and any of us tell Your Honor that that is the statute of Kentucky, you have a right to accept that as the statute of Kentucky if you are satisfied with it, or the statutes themselves may be introduced in evidence, or lawyers may come here and testify as to what the statutes and the common law are.

When you give the law to the jury, you give it to the jury in an instruction just exactly like you do any other law. You make no reference to Kentucky law or federal law or Virginia law. You tell the jury what the law is that is applicable to the facts in the case.

To give the jury an instruction like this just leaves the matter entirely wide open. I don't think these gentlemen would do it, but under this instruction they could argue anything on earth that is in the judicial decisions of Kentucky, anything that is in the statutes of Kentucky, anything that is in the Federal Constitution or federal statutes on the subject if any of them are applicable. That just isn't the way to instruct the jury on the law in another jurisdiction. We think when you tell the jury what the law is in instructions without any reference to Kentucky law, federal law or any other law, that is all that you should do.

The Court: All right, Mr. Mullen.

Mr. Mullen: Colonel?

Colonel Harris: Mr. Allen argues as to the page 2366 } manner in which we should prove the Kentucky law. I am under the impression—I would be glad to have the Virginia lawyers correct me—that the Virginia code provides that the court shall take judicial knowledge of foreign laws, and it isn't a question of what we prove. In this case it was stated in the beginning—that is, the beginning so far as I am concerned—I wasn't here at the very first—that the law of Kentucky governed. This is not a case where the jury is considering a Virginia wrong. The jury may have some idea from previous experience what Virginia law is, and we think that it is only fair for the jury to know that the law that they are enforcing in a Virginia court is the law of Kentucky.

Mr. Pollard: There is this thought, too, Your Honor: We have a very strict law in Virginia, the Right to Work Law,

and some of these instructions may seem liberal to the jury. They will say to themselves, "I didn't know you could do that under the law." They have to realize or have some instruction to them that it does not apply to Virginia law, but to Kentucky law.

Mr. Robertson: Are you all through?

Mr. Pollard: Yes, sir.

Mr. Robertson: What troubles me about that is that I am not talking about the method of proof or what the Kentucky law is. Of course the substantive law of Kentucky does apply and should be set out in proper instructions as we have tried to do here for both sides. I don't think it is proper, but to meet their objection, I would be willing and I think the instruction could be corrected to say this: "Since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive rights of the parties in this cause," period.

The Court: "In this case." That is what I had in mind, to stop right there.

Mr. Robertson: I don't think they have any right to object to it if it stops there.

Colonel Harris: We would, of course. We stand on it.

The Court: I will give the instruction down through the word "case," period.

Mr. Fred G. Pollard: We except to the Court's ruling.

Mr. Mullen: Do you want to take a copy and mark on it "rejected"?

The Court: Let's see. I wonder if I should mark this refused as tendered. Then would it be your idea that you would offer the instruction down through "case" on the third line, since the Court has refused the instruction which includes "and the law of Kentucky includes the Constitution of the United States, the applicable federal laws, the statutes of Kentucky and the decisions of the court of last resort of Kentucky."

Mr. Mullen: I think it is necessary for us to offer that. The Court has ruled. We don't have to offer anything more.

The Court: Not unless you want to.

Mr. Mullen: It becomes a question of instruction.

Mr. Fred G. Pollard: That will be in the instruction? We don't want to withdraw it.

The Court: What I was thinking was that I would mark this instruction refused, and then you save your point, and then you come back with another instruction in lieu thereof down through the word "case". Wouldn't you be saving your point on this instruction?

Mr. Robertson: Couldn't you do it this way, Judge? Just have the record show that the instruction as offered was refused and the Court upon motion of the plaintiff modified the instruction over the exception and objection of the defendants and gave it as follows.

Mr. Mullen: I think that is the proper way to do it.

Mr. Allen: Not upon motion of the plaintiff, but upon plaintiff's objection, modified the instruction to meet plaintiff's objection.

Mr. Mullen: I think that is the way.

page 2369 } The Court: I should probably mark refused on the original.

Mr. Mullen: Yes.

Mr. Allen: That is right, and your exception then would be to giving the instruction as modified.

Mr. Mullen: Yes. We except to the action of the Court in rejecting Instruction A tendered and save the exception, and also object to the modification of it.

The Court: Then you are going to prepare an instruction in accordance with the Court's ruling.

Mr. Mullen: Yes, we will do that.

The Court: All right.

Mr. Robertson: I think we can get together on Defendants' Instruction B very quickly.

"The jury is instructed that:

"The burden is upon the plaintiff to prove by a preponderance of the evidence all facts necessary to constitute a claim for damages against the defendants. And you may consider a fact established by the greater weight of the evidence as being proven by a preponderance of the evidence, but a preponderance of the number of witnesses for the proof of a fact does not constitute a preponderance of the evidence."

If you put the word "necessarily" in there, "does not necessarily constitute." That is a very stereotyped instruction, but it is not given in the exact words that it is generally given in Virginia, but if you put "does not necessarily constitute a preponderance of the evidence, I think it is all right.

Mr. Allen: May I make an observation on the words "but a preponderance of the number of witnesses." "Preponderance" is not the correct word to use there. It ought to be the greater number.

Mr. Mullen: I agree with you on that.

The Court: In the third from the last line, "but a greater

number of witnesses for the proof of a fact does not necessarily constitute a preponderance of the evidence."

Mr. Mullen: Instead of "necessarily," say "does not in itself."

Mr. Robertson: It may or may not.

The Court: It is a question for the jury.

Mr. Robertson: It leaves it wide open for argument.

The Court: The jury may believe one and disbelieve ten.

Mr. Allen: The testimony of one may preponderate over that of ten.

The Court: I think the word "necessarily" is all right.

Mr. Fred G. Pollard: We have no objection to that. Does the Court grant that?

page 2371 } The Court: The Court grants defendants' Instruction B as modified.

Mr. Mullen: We do not take an exception to that.

Mr. Robertson: Are you ready for C?

The Court: Defendants' Instruction C.

(Defendants' requested Instruction C follows:)

"The jury is instructed that:

"The plaintiff's common laborers and carpenters helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in picketing, and to assemble peaceably.

"In the exercise of these rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference.

"The above rights are not lost because others who are not employees of the plaintiff join with them in asserting their rights.

"Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the
page 2372 } picketing of its peaceful character."

Mr. Robertson: We have been over "C" here and I think that with some minor changes we might agree on that one.

Mr. Lowden and Mr. Allen have worked on that since I have.

The Court: Let the Court read this instruction, please.

All right, Mr. Lowden.

Mr. Lowden: With the following changes, Your Honor, I would not have any objection to this one.

In the first line change the words "common laborers and carpenter helpers" to "employees."

Insert a word in the last line of the first paragraph "to engage in *peaceable* picketing and to assemble peaceably."

Then in the next line say "In the exercise of the rights set forth above such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference, provided they resorted to no violence, intimidation, threats or coercion."

"The above rights are not lost because others who are not employees of the plaintiff join with employees of plaintiff in asserting their rights in a lawful manner."

Otherwise, we think it is all right.

Mr. Mullen: What do you want up in the first of it?

Mr. Lowden: Just "employees" instead of page 2373 } "common laborers and carpenter helpers." I think we are going to come to the point you are trying to make in some of your later instructions.

Mr. Mullen: Are you through for the time being?

Mr. Robertson: "Employees" includes all employees. That is what we are doing. We are not picking out one category. It is all of them.

Mr. Pollard: Your Honor, the evidence is that all of the plaintiff's employed except the common laborers and carpenter helpers were already organized. These employees were not organized. These are the ones to whom these rights particularly apply.

Mr. Mullen: It is the basis of our case, and we have a right to an instruction on it. Common laborers and helpers are what we are dealing with.

Colonel Harris: We didn't have to organize the A. F. of L. members all over again. That charge would incorporate the A. F. of L. members in to the laborers and helpers as a limitation on their right. What one group of men do doesn't deprive the other men of their legal rights. The A. F. of L., under the undisputed evidence, is a craft union. The common laborers and carpenter helpers belonged to a different craft from any of those that were, under the evidence, organized in this case. They have a right to their independent unions. They have a right to organize. They page 2374 } have a right to strike. Nobody can get together and write a contract and leave the carpenter helpers and common laborers out in the cold, not covered by the contract and not having any ability to exercise the rights

given by the law. That is what they are seeking to do here.

Mr. Fred G. Pollard: Frank, what was the second change you wanted?

Mr. Robertson: Wait a minute.

Mr. Lowden: Let's give them the change.

Mr. Robertson: Yes.

Mr. Lowden: In the last line "to engage in *peaceful* picketing and to assemble peaceably."

The Court: Where is that?

Mr. Allen: The last line of the first paragraph.

The Court: " * * * had the right to strike, to engage in peaceful picketing—"

Mr. Fred G. Pollard: Your Honor, the word "peaceably" at the end seems to apply to everything in that sentence.

Mr. Lowden: No, it only applies to "assemble peaceably."

The Court: " * * * to engage in peaceful picketing and to assemble peaceably." You had something else you suggested.

Mr. Lowden: That is all in that paragraph. Then in the next paragraph, "in the exercise of the rights set forth above such employees had the right to interfere with page 2375 } the plaintiff's business without being liable in damages for such interference, provided they resorted to no violence, intimidation, threats or coercion."

Mr. Pollard: We particularly object to that, Judge, because the first paragraph sets out the rights, and all the second paragraph says is that in the exercise of these rights if you don't exercise those rights peaceably, without violence, you haven't exercised them.

Mr. Mullen: We already have the word "peaceably" up there, and it refers back.

Mr. Fred G. Pollard: They just want to spot our entire instruction with "peaceably" all the way through when it is in there all that is necessary.

The Court: Anything further?

Mr. Allen: They start an entirely new paragraph, set it off by itself.

Mr. Robertson: We want to have an orderly discussion after they understand the changes that we have suggested.

Mr. Allen: They made their objection first. We understand we make our objection first, they reply, and we conclude.

Mr. Lowden: What we are doing now is pointing out to them what the changes are that we suggest.

The Court: Would there be any objection to a page 2376 } change in the second paragraph to read, "In the exercise of the above rights"?

Mr. Mullen: That is exactly what I was going to suggest.

Mr. Fred G. Pollard: None.

The Court: We will change that to "above rights," then. And at the end of the first paragraph, the last line, insert before picketing "peaceful" picketing. I don't think you have any objection to that, do you?

Mr. Mullen: No.

With those two amendments I think the instruction is all right.

Colonel Harris: You didn't change the words "common laborers and carpenter helpers"?

The Court: No.

Mr. Mullen: "Peaceful" picketing and the "above rights."

Mr. Allen: There is one other that I don't think has been called to your attention. That is the end of the first line of the third paragraph. That line reads: "The above rights are not lost because others who are not employees of the plaintiff join with them in asserting their rights *in a lawful manner*." The others coming in a lawful manner, too. That is the only time we referred to others, and I think that matter is necessary.

page 2377 } Mr. Fred G. Pollard: It still refers to the above rights, Judge.

Mr. Allen: Yes, but all the above rights are dealing with the employees, and now we are coming to others.

Mr. Mullen: No. "The above rights are not lost because others who are not employees of the plaintiff join with them in asserting their rights," the employees rights. It is the same thing as above.

Mr. Fred G. Pollard: You could change it to such rights, in asserting such rights.

The Court: How about after "their" putting in brackets "(the employees)"?

Mr. Mullen: All right.

Mr. Fred G. Pollard: Employees or the employees?

The Court: Which do you suggest?

Mr. Fred G. Pollard: Just employees alone?

The Court: Yes, that identifies "their".

Mr. Robertson: I think it would be clearer if you said "in asserting the employees' rights."

Mr. Fred G. Pollard: I think Mr. Robertson is correct, sir.

The Court: "The employees' rights."

Mr. Lowden: Judge, I want to be heard on this in rebuttal when they get through.

The Court: Which one?

page 2378 } Mr. Lowden: This instruction.

The Court: I thought we were through.

Mr. Lowden: No, sir.

Mr. Fred G. Pollard: That is plural possessive.

The Court: All right, Mr. Lowden.

Mr. Lowden: If Your Honor please, if you do not change the words "common laborers and carpenter helpers" in the first line, then Your Honor has made a ruling that those people alone had the right to bargain collectively for that particular group, and I do not think that was their right. They can get the right in one of two ways, either under the National Labor Relations Act or under the statutes of Kentucky. Under the National Labor Relations Act the National Labor Relations Board would have the power to determine whether that group of people was an appropriate unit, and under that act I don't know what the powers of this court are to do that in a case of this kind. They claim they are not under the National Labor Relations Act, but if they were, the appropriate unit might be all of Laburnum's employees, wherever they may work all over the United States, which is in fact the way he bargains and has been bargaining for many years. To come along and say you cut 16 people of that and make that an appropriate unit and give them the right to designate a bargaining agent for that little group, I seriously doubt if that is correct.

page 2379 } The Court: Don't those 16 men—you say they are 16 men—have the right to organize and join the United Construction Workers or A. F. of L.?

Mr. Lowden: Yes, sir. Maybe they didn't intend it this way, but the way it is written it is an instruction by this Court not only that they had that right, which we don't deny, but it is a finding by this Court that they had a right to get a contract for that particular little group. That is not necessarily right. If you go to the statute of Kentucky, which we are going to have a big argument about here today, I think, I doubt that they have the right under that statute because that statute says the employees shall have the right to bargain collectively, but it doesn't say part of them. I think it means all of them. If that is the case, that they have the right to designate collective representatives of their own choosing, it would mean all the employees working on that job, carpenters and laborers together. I don't think the problem is as simple as these gentlemen are making out, by any means.

Mr. Robertson: I think it should be broadened to include

all employees, and then it is open to argument in whatever way it is not limited by other instructions of the Court.

Mr. Allen: Before we conclude our part of it, I want to have something to say on that.
 page 2380 } The Court: You gentlemen close. We have gotten off the track a little bit, so I will let you gentlemen take the ball at this point and let them close.

Mr. Mullen: If Your Honor please, there isn't any merit whatever in Mr. Lowden's objection there. It is in evidence that neither the A. F. of L. union out there nor here ever applied to the National Labor Relations Board to be designated the representative of all the employees, and that is the only way they could do it. I asked that specific question, and the answers were no. They have the right in classes of labor to organize separately unless there has been an application to the National Labor Relations Board and a designation of a union as representing all the employees. These people were out in the cold, were not represented by anybody. They had a right to organize, to select representatives of their own choosing. Nothing in the Kentucky law or anything says that all of every class of labor employed by any employer have got all to join together, or none can. That is the most—I won't use the word. There is nothing in that whatever.

Mr. Fred G. Pollard: Your Honor, look at the plaintiff's Instruction 1-A, which is the Kentucky statute, and look at the first paragraph of our Instruction C, and you will see that it is a paraphrase of that statute. The only thing that has been done is to punctuate the statute, which
 page 2381 } has not been punctuated. That Kentucky law in plaintiff's instruction 1-A says that employees may do all of the things listed in our instruction. All that instruction is doing is bringing the Kentucky law down to the facts of this case. The Kentucky law says employees may do this, our instructions say the common laborers and carpenters helpers can do this. They were unorganized, and they had the right to organize and to associate themselves together for the purpose of self-organization and so forth. I don't see a thing in the world wrong with bringing the facts of this case down to what the law itself actually says.

Mr. Mullen: The facts based on our theory of the case.

Colonel Harris: If the Court pleases, there is this additional factor: If what Mr. Lowden argues is taken as true, any majority group could get together, without ever applying to the National Labor Relations Board to represent all employees, and say, "We will form a union, and once we have formed one, the other 49 per cent of the employees are deprived of all lawful rights given them by the statutes of Ken-

tucky. They can't organize because we have pre-empted the field. The only way they can pre-empt the field is to get certified by the National Labor Relations Board.

So it seems to us in this particular case it is really too clear for argument that they can't get together and
page 2382 } work out a contract and exclude everybody else from equality under the law.

Mr. Allen: Have you finished?

Mr. Fred G. Pollard: Yes.

Mr. Allen: If Your Honor please, the Kentucky statute simply says in part (e) they have a right to organize. That means common laborers, it means skilled laborers, it means all classes of employees. It would give the members of the A. F. of L. just as much right to organize those common laborers as it would give their clients to organize them. This instruction as it is drawn here in fact is a directed instruction on an issue of fact. Mr. Bryan testified that he doubted—in fact, he said emphatically that Hart furnished no proof to him that he represented the common laborers, a minority or majority, either. As I understand the law, what little I know about the labor law, it is held in several cases here in Fed. (2d), and I will give you the citations. In the case of *Texas-arkana Bus Company v. National Labor Relations Board*, 119 Fed. (2d) 460, *National Labor Relations Board v. Empire Furniture Company*, 107 Fed. (2d) 92, and in *International Woodworkers of America, District of Columbia, Council No. 5, 135 Pacific (2d) 759*, all of those cases—and they are late cases—hold that there must be presented to the employer evidence showing that the representative is an authorized bargaining agency for employees.

page 2383 } Wherein did Hart ever present to Mr. Bryan any proof that he represented any of his employees? He just came there and said so. If they had a meeting and decided this, that or the other, he presented Mr. Bryan with no proof. Mr. Bryan said he investigated the matter, and he had no proof, and he didn't believe that he represented them. If that instruction is to be given at all, it certainly should not take away from the jury the question of fact involved.

The Court: Does it take away the question of fact?

Mr. Mullen: Not at all. You all are going to argue just what he said, and I am going to argue just the opposite.

Mr. Allen: Wait a minute. "The plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self organization—"

The Court: Didn't they have that right?

Mr. Allen: Wait a minute. Let's get along. "To designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably, "in the exercise of these page 2384 } rights," and so on.

There isn't anything in that instruction which would put upon the defendants any duty whatsoever to furnish any proof that Hart did represent those people. That is what I am getting at. It leave that whole question out.

Mr. Robertson: Who is going to end the argument?

Mr. Fred G. Pollard: I would like to ask the Judge a question, Mr. Robertson, if I may.

Your Honor, Mr. Allen in his rebuttal brought in a new matter that hadn't been brought in before, which I think we should be entitled to answer, the cases that he referred to.

Mr. Robertson: We hadn't finished.

Mr. Lowden: When we get through you have the right.

The Court: Let them finish, and I will give you an opportunity.

Mr. Fred G. Pollard: All right.

Mr. Robertson: If Your Honor please, here is the thing that we object to in the opening sentence there. The statute uses the word "employees," and that includes the A. F. of L. people out there. They have changed it from "employees" to "common laborers and carpenter helpers." If they are paraphrasing the statute let them paraphrase it and say "employees," which is the term of the statute, and page 2385 } then as Mr. Mullen said it is wide open for us to argue about the A. F. of L. and for him to argue about Hart and his crowd.

Supplementing what Mr. Allen has said I think it is very interesting that he said he had no proof that Hart had ever represented anybody. As a matter of fact, from my reading last night of notes made during the progress of this trial, according to his own admission Hart called Bryan up, and he had signed up four, but it is very interesting to note that when Fohl talked about how he went to Bryan's office, he said Bryan said he had a contract with the Richmond Trades Council but he didn't offer him any proof of it. "I never saw the thing. I never saw any proof of it."

In other words, they don't have to offer the proof, but we do.

I say here, if they are going to paraphrase the statute they ought to paraphrase it in the words of the statute and use

"employees" and leave it wide open for everybody to argue except as restricted by other instructions of the Court.

I am going to ask Mr. Lowden to close for us.

Mr. Lowden: Here is the thing in this instruction that is disturbing me, if Your Honor please. I have taken the trouble to read every case in every jurisdiction on the statutes of this type. Suppose he had organize only four page 2386 } laborers, and that is all he had, do you mean to say they had the right or we were compelled to negotiate a contract for just four of the laborers? Suppose he represented only eight of them, would we have had to make a contract with him? Would they have had the right to negotiate just for the eight? Suppose he had half the laborers and half the carpenters, would we have had to make a contract with him for half the laborers and half the carpenters? Did he have to have them all? Did he have to have a majority of them or what did he have to have?

It seems to me in the instruction, if given in the form they desire it, the Court is saying at that stage that the common laborers and helpers are the group they had to have.

The thing these gentlemen are talking about is coming up later, but the first thing that comes up in this case is the telephone conversation of July 14 with Mr. Hart, and Mr. Bryan says, "I deal with the A. F. of L. They represent my people." What he is saying to them in effect is "Almost all my employees now, 99 per cent of them, are covered by A. F. of L. contracts and they belong to the A. F. of L.," denying the right to come in and cut off a small segment and denying that that unit for bargaining purposes is appropriate.

The Court: Do I understand you to contend page 2387 } that the unit includes carpenters, laborers and carpenter helpers?

Mr. Lowden: I don't know the answer to that. We have had a lot of discussion about that. They don't know the answer to that, either.

The Court: In other words, whether you can organize the whole group together and whether the laborers can organize separately. That is what runs through my mind.

Mr. Robertson: The statute doesn't say, and no human being can find out.

Mr. Lowden: I will inject this into it. I would think that if this statute should be construed as establishing a smaller bargaining unit for Mr. Bryan's concern which might be within the jurisdiction of the National Labor Relations Board. I am not sure the statute wouldn't be unconstitutional to that extent, because I do not think the statute of Kentucky can provide for a different type of appropriate unit than is pro-

vided for in the National Labor Relations Act. I am not going to sit here and tell the Court that I know what an appropriate unit is under that statute because I don't know, and neither can any of the other courts tell. I will read what a judge said out in California, and he has changed his mind three or four times. This statute is a little broader than the one under consideration and is a little more indefinite in what it provides.

The Court: Let me ask you this. Are we going into a lot of this in more detail later?

Mr. Robertson: Yes.

The Court: I would suggest, then, that you allow the Court to pass this tentatively.

Mr. Lowden: Maybe they don't think it is a problem, but I think it is going to be a real serious problem.

The Court: It may save time if we are going to have to go into this in detail later.

Mr. Robertson: I think we will save time right now, Your Honor.

Mr. Mullen: We hope to get through ours today.

Mr. Lowden: If I may suggest this, I think you all will agree with me that we will have a real, sure enough argument on this, do you not?

Mr. Mullen: Of course we have an argument on everything we bring up.

Mr. Lowden: The thing runs through several of their instructions, and I would think if we went through and weeded them out and then had the argument all at once.

Mr. Robertson: Let him read this from the California case.

Mr. Mullen: I know there is nothing in it because I have been in too many labor organization matters and bargaining, I know you can divide them up into three or four groups in the same company and I have had it done on me.

page 2389 } Mr. Allen: May I ask you a question which will clear it up, Mr. Mullen. Didn't the A. F. of L. have the right in a proper sort of manner to organize those common laborers?

Mr. Mullen: They had the right but they didn't do it.

Mr. Allen: Didn't they have the right?

Mr. Mullen: Any of them had a right to do it. They were wide open.

Mr. Allen: Whether they tried to do it or did it or got applications, as the testimony shows, is a question of fact. You cut off that feature of it by this instruction. You say that your men had a right.

Mr. Mullen: We don't cut it off. I will save this for my argument.

Mr. Lowden: I would suggest that we keep on going.

The Court: That would be my suggestion. Mr. Pollard, is that agreeable with you?

Mr. Fred G. Pollard: I want to make one short statement. Mr. Allen referred to a lot of cases about proof of representation, and they have no place in this because naturally they were all cases where unions were seeking recognition under the Labor Act, and under the Labor Act you require proof of representation.

The Court: I will put "o. k." with a question mark on this one, tentatively approving Instruction C.

Mr. Allen: The Judge hasn't approved it yet.

The Court: I have tentatively approved C.

Now we go to Defendants' Instruction D.

Mr. Robertson: I will ask Mr. Lowden to discuss that.

The Court: If you don't mind, Mr. Lowden, will you read it?

Mr. Lowden: All right, sir.

"The jury is instructed that:

"In Kentucky the employees of the plaintiff, including common laborers and carpenter helpers, had the right to organize to promote their mutual advantage, to secure fair wages, to secure better working conditions, to secure better hours, to induce employers to establish usages with respect to wages and working conditions which are fair, reasonable, and humane, and to achieve the fundamental right to contract collectively with the plaintiff, Laburnum Construction Corporation.

"To accomplish these legitimate ends, employees of the plaintiff, including common laborers and carpenter helpers, may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members; may acquaint the public with facts which it regards as unfair: publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellowmen, and endeavor in peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate

labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to gain their ends."

I see nothing the matter with the first paragraph, and I see nothing the matter with the second paragraph except the sentence, "when engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places."

I am aware of the fact that that sentence was copied out of a Kentucky case, but I would like to suggest to the Court that the crowd in and of itself may be intimidatory, depending upon the circumstances of the case. What might be a lawful crowd in Richmond or in a city may not be out in the woods.

Mr. Robertson: I think that is what I have said. For instance, I don't think I have any right to argue this to the jury, but I think it is a fact that every time we took depositions in any isolated place, this fellow David Hunter and Noble Hobbs and sometimes others would be sitting *would be sitting* there looking you in the eye. I can look Your Honor in the eye right now and make it just about as insulting and just about as threatening as any words I can utter. I think they intimidated these men at those depositions. I think that is why they were there. I say I have no right to use that in argument before the jury. I say it all depends on what sort of crowd gets there. The very presence of a crowd may in itself constitute a threat.

The Court: It would be a question for the jury whether or not this crowd intimidated.

Mr. Robertson: Yes, I think it would be.

Mr. Mullen: This is word for word, as they admit, from a Kentucky case.

Mr. Fred G. Pollard: Your Honor allowed Mr. Robertson to rise to a point of personal privilege, and I would like to do so now, if I may. Mr. Robertson's statement that we had these people there at the taking of depositions for the purpose of intimidation of witnesses is wholly without any foundation in fact.

Mr. Robertson: I didn't say you did it. I said that I thought that was the effect of doing it.

Mr. Fred G. Pollard: You said you thought that was the purpose.

Mr. Robertson: I think the labor union did it. page 2393 } I think David Hunter is one of the most villainous looking men I ever looked at, and Hobbs seems to be a nice enough looking fellow.

The Court: The argument doesn't go before the jury and

it is not going to have any effect on me one way or the other.

Mr. Fred G. Pollard: It is in the record, and it is not proper.

The Court: You have answered him.

Mr. Fred G. Pollard: Those men were there at our request so that we could get any information that they had about their connection with this case. We had a right to have them personally there representing the defendants, and that was the sole reason they were there. Mr. Robertson's statement of anything to the contrary is not true.

Mr. Robertson: If Your Honor please, let us close this down on this. I didn't attribute it to counsel. I say that I can name instances where a man would come in there and see them and go out in the back room, and he would come in and say he was scared to testify and didn't testify. That has nothing to do with this, however.

Colonel Harris: I arise to a point of personal privilege also. Some of those depositions were taken when Mr. Pollard was up here, and he can speak for the ones that he was in, and as to the ones that I was in down there page 2394 } that statement is absolutely incorrect. We only exercised the lawful right that we had. I saw no signs of intimidation or threat or anything of the sort. The only thing that was reported to me was that they had some man out in the hall who refused to testify and then when he refused to testify they put on Bert Preston and took another deposition from him, as I recall it.

The Court: Let's go on with the argument, gentlemen.

Mr. Allen: I wasn't there.

The Court: I wasn't either.

Mr. Robertson: Dixon refused because he said at that time he was in the coal business running a trucking coal mine and if he testified they wouldn't let him sell his coal.

The Court: We are wasting time. Let's get on with the instruction.

Mr. Lowden: In the second paragraph we want to insert the words "intimidation, threats, or coercion" following the word "fraud" in the fourth line.

Mr. Robertson: How about a way down at the bottom.

Mr. Robertson: Judge, also "When engaged in a lawful strike its members may join in a crowd to peacefully persuade other men who propose to work not to take their places." To persuade them peacefully.

Mr. Allen: It ought to be an orderly crowd, too.

Mr. Robertson: "Its members have a lawful page 2395 } right to assemble peaceably to address their fellowmen, and endeavor in peaceful, reasonable,

and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate labor ends, and finally its members may peaceably assemble—"

The Court: Mr. Moore wants to add something.

Mr. Moore: I want to make sure you understood our point on the fourth line down after the word "fraud," to put in "coercion and intimidation."

Mr. Allen: "Not partaking of fraud." It should not be limited to fraud, but intimidation, threats or coercion.

The Court: Do you have any objections?

Mr. Mullen: We have a labor case, the Lee case in Kentucky, involving the same question. This language is direct language taken from the Court's opinion. There is no change in it in any way, shape, or form. They have used "crowd," and "mob" all through their instructions, and we are entitled to this. Of course they don't want the jury to be told they can join in a crowd. We have that right. They have it under the decision of a Kentucky court. Mr. Pollard will read you the Kentucky case and you will see that it is word for word.

Colonel Harris: If Your Honor will look at your instruction you will see how closely it follows the instruction.

Mr. Fred G. Pollard: Your Honor, this is the page 2396 } *case of Blandford v. Press Publishing Company*, 151 S. W. (2d) 440, the leading Kentucky case. We have omitted one or two things that have no bearing on the case, but I would like to read the finding of the court here and ask that you follow the second paragraph as I read it.

"To accomplish these legitimate ends, a labor organization may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members, may acquaint the public with facts which it regards as unfair, publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellow men, and endeavor in a peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to gain their ends, that is, use persuasive powers in a peaceful way."

Mr. Robertson: Why did you leave out "persuasive powers in a peaceful way"? We are just trying to get the peaceful way in it.

page 2397 } Mr. Mullen: Because we use it up above there.

Mr. Robertson: You left out the last phrase in the paraphrase because you didn't like it. You put that in there and I will withdraw my objection.

Mr. Mullen: All right, put that in there.

Mr. Pollard: " * * * to gain their ends, use persuasive powers in a peaceful way."

The Court: That is granted.

Mr. Lowden: No objection.

Mr. Moore: That is the only change.

The Court: Yes, that is the only change.

Mr. Fred G. Pollard: We would like to make one change in the fourth line of that one.

Mr. Allen: The fourth line from the beginning.

Mr. Fred G. Pollard: Yes. We have the word employers in there, and we would like to change that to the word plaintiff.

The Court: Is there any objection to that? That would be the plaintiff in this case. There is no objection to that.

(Defendants' requested Instruction E follows:)

"If you find from the evidence that the plaintiff's employees refused to work for it solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line, your verdict must be for page 2398 } the defendants."

The Court: That is granted.

Mr. Robertson: We have no objection to "E".

Your Honor, we do object to "F".

The Court: (Reading.)

"The jury is instructed that:

"Under the law the plaintiff had the duty to bargain collectively with the representatives of its common laborers and carpenter helpers. If you believe that any of the defendants was the representative of such employees and that the plaintiff refused to bargain with them, then the plaintiff acted unlawfully."

Mr. Robertson: If Your Honor please, when you come to "F" you are right square back where you were on the one

that you passed a moment ago. I am going to get Mr. Lowden to discuss this, but it is perfectly obvious from the beginning there when Hart walked up he said "I represent the majority. Come along now or get out." According to our testimony, Fohl had already lied to Bryan at Hopewell. I say, according to our testimony, Fohl had given Bryan a false statement of fact when he said he had them all organized at Hopewell. That was the background of it. According to our testimony, Hart spoke untruthfully when he told Bryan on the 14th that he represented them when he represented but four. Under this instruction, leaving out the law of it, but page 2399 } just on the facts, according to this instruction as I interpret it, we had to accept anything Hart said at face value and go ahead and act as he told us.

I am going to ask Mr. Lowden to take it up there.

The Court: Let me read this once more, please.

(Court reading instruction.)

Mr. Lowden: Judge, we are right back to the same hitching post.

The Court: Do you think this is the time to beat it out?

Mr. Lowden: I don't know how many more times it comes up. I am sure it comes up some more.

Mr. Robertson: Let's pass it.

The Court: Let's pass it by.

Mr. Lowden: So far as I am concerned, directly on that point I want to make a full scale argument. I think we ought to weed out the rest of it.

The Court: Let's take the rest of them and come back.

Mr. Robertson: Now we come to "G".

"The jury is instructed that:

"None of the defendants can be held responsible or liable for any unlawful acts of individual officers, members or agents except on clear proof of actual participation in, or actual authorization of, such acts or of ratification of such acts after actual knowledge thereof."

We think that has been covered by prior rulings of the Court. The Court has said it is the recognized rule in Kentucky that you don't have to have prior authorization, you don't have to have subsequent ratification, and if you have knowledge and acquiesce and fail to repudiate it and accept the benefits, you are bound by the acts of the agent within the scope of his authority. We say that you can have con-

structive knowledge as well as actual knowledge. When you come to Tom Raney's accountability to John L. Lewis, who hires him and fires him, to the setup there in the offices, to the nature of the territory through which they operate, to the fact that he went out over the territory with Hunter and helped Hunter and gave Hunter his advice and assistance and, we contend, gave him orders under the guise of polite language, that they are bound by it and that instruction is fundamentally wrong any way you look at it.

Mr. Moore: The big battle we had on Instruction 4 of ours is the basic agency argument. This is the Norris-LaGuardia Act argument we had there.

The Court: I recall the discussion.

It seems to the Court that we went into this pretty thoroughly.

Mr. Allen: We covered it thoroughly in Instruction No. 4.

The Court: I don't know whether you gentleman page 2401 } men have anything in addition you want to say in regard to that.

Colonel Harris: There is one statement they make that we want to reply to. They state that this already has been covered in other instructions of the Court, and we don't think that is quite correct. We think this instruction standing alone correctly states the law, and the law as stated there has not been so simply, so clearly, and so accurately stated as it has in that instruction.

Mr. Fred G. Pollard: Your Honor, I would like to say that in as much as they alleged ratification, it certainly would be proper to give an instruction to the jury that they had to believe that there was ratification.

The Court: Hasn't our Court of Appeals held that you don't have to prove everything you allege?

Mr. Moore: Yes.

Mr. Fred G. Pollard: You don't have to prove all of the facts you allege, but this is an allegation of agency, an allegation of ratification. I don't think that any useful purpose can be served by our going through the whole argument.

The Court: You went into it pretty thoroughly yesterday.

Mr. Allen: Yes.

The Court: The Court will refuse this instruction.

Mr. Mullen: Please note our objection and exception.

Colonel Harris: I was going to ask that the page 2402 } exception be not only on the argument made today but on the argument made on their instruction defining agency.

The Court: Very well.

Mr. Allen: That is all right.

Mr. Lowden: I think we had that understanding from the beginning. Can't we just eliminate that?

The Court: Any objections you made to their instructions will, if you desire, apply to exceptions to your instructions.

Colonel Harris: I was under the impression that they were only pertinent objections, and that is why I wanted to bring that in on another charge.

Mr. Robertson: If Your Honor please, Defendants' Instruction II:

"The jury is instructed that:

"The defendants are not liable for any wrongful conduct of individuals unless they authorized, instructed or ratified that conduct. And no defendant is liable for the conduct of either of the other defendants unless it authorized, instructed or ratified that conduct. You cannot consider the declarations or writings of any individual to establish the fact of authorization, instruction or ratification of his conduct."

We think that is exactly the same instruction page 2403 } that we have already argued with this slight modification: "You cannot consider the declarations or writings of any individual to establish the fact of authorization, instruction or ratification of his conduct." We think that is exactly what you can do, that when they have admitted in their grounds of defense that David Hunter and Hart respectively were both agents of UCW and of District 50. We come on back to the close relationship between A. D. Lewis, John L. Lewis, Kathryn Lewis, and John L. Lewis, and the fact that every report that Hart made to Hunter, a copy went to headquarters in Washington, and every report that David Hunter made, a copy went to Washington to A. D. Lewis in his other capacity. If it was made as United Construction Workers report it went in to Washington. If it was made as a District 50 report it went to Washington. They disclose through those reports that Raney was going all through the territory helping David Hunter and advising him, aiding him, either taking orders from him in the form of requests or giving them. That is all circumstantial evidence and direct evidence which is directly admissible for the purpose of proof of our case.

Mr. Moore: The definition of agency in this is exactly like the definition of agency in Instruction G. It is based on the Norris-LaGuardia Act.

The Court: All right, gentlemen?

Mr. Fred G. Pollard: Judge, I asked Mr. page 2404 } Barrett to get a book this morning—

The Court: He got the wrong book?

Mr. Fred G. Pollard: He got 58 S. E. instead of S. W., and I think it was my fault. The case in there is *Newberry v. Faulconer*, 58 S. W. (2d) 217. I have a quotation from that case but I wanted to get the entire case. The case holds:

“We find the rule to be that evidence of statements or declarations of an agent is inadmissible to establish the fact of agency or the extent of the authority.”

The case goes on to say:

“If the extent of an agent’s authority may not be established by proof of his declaration, it is self-evident that the same rule would forbid admission of his declarations to establish ratification, which would relate back to and supply want of authority in the original transaction.”

That case covers the last sentence in that instruction.

The Court: Let me ask you this, Mr. Pollard: Aren’t the interrogatories admissions when they are addressed to the defendants themselves?

Mr. Fred G. Pollard: Yes. This concerns individuals. I don’t think the word “individual” refers to one of the defendants. What we mean is that no statement in the depositions or in the testimony of Raney or Hart can page 2405 } establish the fact of agency or the extent of authority, and that is what this Kentucky case says. I realize that the first two sentences of that instruction have already been ruled on by Your Honor.

Mr. Allen: What was that?

Mr. Fred G. Pollard: The first two sentences of that instruction.

The Court: Have already been ruled on, he says.

Mr. Fred G. Pollard: I don’t think it is necessary to wait for Mr. Barrett to get that case. That is all we have to say on it. Here is a case that says exactly what the last sentence says.

Mr. Moore: The first two sentences you admit have already been ruled on and must come out. Is there any point in putting the last sentence in?

Mr. Fred G. Pollard: Yes.

The Court: Mr. Pollard, I am going to ask you to read that statement of law again to me which you quoted from your memorandum.

Mr. Fred G. Pollard: "We find the rule to be that evidence of statements or declarations of agency is inadmissible to establish the fact of agency or the extent of authority. If the extent of an agent's authority may not be established by proof of his declarations, it is self-evident that the same rule would forbid admission of his declarations page 2406 } to establish ratification, which would relate back to and supply want of authority in the original transaction."

Would it be beneficial, Your Honor, to review the facts in that case?

The Court: You may do so.

Mr. Fred G. Pollard: This was a case where the manager of a chain store, the manager of one of the stores, was being sued along with the store for slander, and the case held that there must be either ratification or authorization or participation to establish agency. The evidence on which plaintiffs were relying to establish ratification was the statement of the manager of the store that he had reported the incident to his principal and that his principal had written him a letter back and approved of his action. The Court said that that was not admissible for the purpose of proving ratification. We take it that if evidence has been admitted over our objection on this, we are entitled under this case to an instruction saying that the jury can not consider the declarations or the writings of any individual to establish the fact of authorization, instruction or ratification of his conduct.

The Court: All right. Is there anything further, gentlemen, you wish to say?

Mr. Fred G. Pollard: No.

page 2407 } Colonel Harris: I can't add anything to a decision, Judge.

Mr. Allen: If Your Honor please, this question has been up time and again in the Court of Appeals. I have had it a half dozen times in cases myself in trial courts and some of them in the Court of Appeals. When a statement like that is made in the opinion, it means that unless you have some other evidence of agency, if the only evidence that you have of agency is the declaration of the agent, you can't prove the whole agency by that, except in some exceptional circumstances which I shall refer to presently.

Just a brief review of the cases on the subject will show you that that is right. In the case of *Blorum v. Rose*, 144 S. E. 642, 151 Va. 590, the Court held that:

"It may be said in general terms, that whatever evidence has a tendency to prove the agency is admissible, even through

it be not full and satisfactory, as it is the province of the jury to pass upon it.

"Alleged agents' declarations are admissible in corroboration, when evidence tending to prove alleged agency has been introduced."

We have introduced all sorts of evidence here tending to prove agency and Your Honor has given some instructions based on that evidence.

Have you not the opinion there? Go ahead page 2408 } and finish with that, if you don't mind.

Mr. Fred G. Pollard: I think I put in all the pertinent part of the opinion.

Mr. Allen: Then you are not going to come back with comments about that case after I get through? If you are going to make any comments on it, I would like you to make them now so I will have the benefit of them.

What is the style of the case?

Mr. Fred G. Pollard: *J. J. Newberry Co. v. Faulconer*, 58 S. D. (d) 217.

Mr. Allen: This is a procedural matter. We are not concerned with the Kentucky law on this.

Mr. Moore: It is the admissibility of the evidence.

Mr. Allen: Certainly.

The Court: Did you have anything further you wanted to add?

Mr. Fred G. Pollard: I have nothing further.

The Court: You may proceed, Mr. Allen.

Mr. Allen: Further in the same case of *Bloxom v. Rose*, the Court held:

"When evidence has been *introduce* tending to prove the alleged agency, or to make out a *prima facie* case thereof, the declarations of the alleged agent then become admissible in corroboration; and the order in which such proof is introduced is within the discretion of the trial court "

page 2409 } In the case of *Ramsay v. Harrison*, which was a libel and slander case, 119 Va. 682, the Court held that:

"In an action against the principal it is not error to receive the admissions of an alleged agent, tending to establish the agency, when a *prima facie* case of connection between the alleged principal and agent has been shown * * *"

You see, it uses the words "*prima facie* case of connection

between the alleged principal and the agent has been shown.”

“* * * Although the evidence of the agency may be slight, the burden is cast upon the principal to rebut it.”

Again in that same case the Court held:

“In connection with other evidence of agency, held declaration of the agent was admissible to prove agency.”

In connection with that, in the *Royal Indemnity Co. v. Hook*, 157 S. E. 414, 155 Va. 956, the Court held:

“Agency may be proven in many ways, among them by the testimony of the agent himself, and when extrinsic sources a *prima facie* case is made out, the agent’s own declarations and admissions become competent. Frequently it is established and has, of necessity, to be established by circumstantial evidence.”

In other cases the courts hold that the declarations of an agent relating to an act within the authorization of the agent in which the agent was engaged at the time of page 2410 } the declarations were made are admissible.

If a man at the time he is doing a thing which is within the scope of his employment in connection with the business, making reports and the like of that, makes statements which lend color to his acts that shows agency, those declarations are admissible. Some of these statements about agency are in these reports, written reports that were filed in connection with the interrogatories. Those reports were made by the man reporting strictly in accordance with the performance of his duty, and statements that he made in those reports in connection with the agency under this principal are clearly admissible.

As Wigmore says on that same subject:

“Statements of an alleged agent which characterize and qualify an act presently done within the scope of the agency are admissible against the principal.”

The Court: I think you have read enough. The Court will refuse the instruction.

Mr. Fred G. Pollard: We note an exception.

Mr. Robertson: If Your Honor please, coming to Instruction “I”:

"The jury is instructed that:

"Neither the defendants nor any one of them can be held liable for any acts that may have been done unless it be clearly shown that what was done was done by page 2411 } their agents in accordance with their fundamental agreement of association, that is to say of their constitution."

Your Honor, I don't believe that needs any argument. That comes down to the proposition that you have a secret constitution, a private agreement, and then you put Raney, Hart, and Hunter out dealing with the public and they commit a tort, and you have some secret limitation on it. I can go back to my old bus and streetcar cases for that. We give instructions from the company saying if he is driving at night he has to pull the curtain around him. He doesn't pull it around him and we have an accident. You might say you can't mention that because under the secret rules you have violated a secret rule. This is just putting it in a different way. I think that is all there is to it.

Mr. Allen: That principle may be applicable as between the principal and the agent—

Mr. Robertson: Oh, yes.

Mr. Allen: —but it has no application whatsoever between the agent and third persons, none whatsoever, so long as the agent is acting within the scope of his authority or employment. That principle is too simple, it seems to me, to require extended argument.

Mr. Moore: It is stated as follows in American Jurisprudence, Your Honor:

"If relations exist which constitute an agency, page 2412 } it will be an agency whether the parties understood the exact nature of the relations or not."

The Court: All right, gentlemen.

Mr. Mullen: By the way, when you refused "H" I failed to note an exception.

The Court: I think Mr. Pollard did.

Wasn't something said about that question in the Coronado case?

Mr. Pollard: Yes, sir; that is what I was trying to find.

(Off the record.)

Mr. Fred G. Pollard: It is in the second Coronado case, which is 268 U. S. at page 304.

Mr. Allen: You don't have the Supreme Court report?

Mr. Fred G. Pollard: No, I have not, sir. The court said there:

"But certainly it must be clearly shown, in order to impose such a liability on an association of 450,000 men, that what was done by their agents in accordance with their fundamental agreement of association "

Then it goes ahead to quote from the earlier *Coronado* case, and in the last sentence of the quote, which is at the top of page 305 of 268 U. S., the Court said:

"It is a mere question of actual agency which the constitutions of the two bodies settle conclusively."

page 2413 } Mr. Allen: Let me see that, will you, please?

Mr. Fred G. Pollard: Have you anything further to say on that question?

Colonel Harris: The only thing, if the Court pleases, as I understand it the decisions of the Supreme Court of the United States are great persuasive authority in the courts of Virginia, and we are not confronted with any question of interstate commerce or the Sherman Act or any federal statute in that pronouncement of the law. That is the question of the fundamental law of agency of a voluntary association.

Mr. Robertson: Are you all through?

Mr. Pollard: I just wanted to point out to the Court that the *Coronado* case was cited with approval and was followed in the case of the *United States v. White*, which is reported at 322 U. S. 694, decided in 1944.

Mr. Robertson: If Your Honor please, Mr. Allen has read the *Coronado* case more recently than I have, but my recollection from a review of it here the other day is that it went off on a question of procedure. My recollection of the case also is that the Court said there was no evidence one way or the other of the existence or the non-existence of any acts of agency. In other words, there was nothing to go back to but the fundamental agreement between the parent union and its subordinate branches, that that was all they had
page 2414 } to go to, therefore they went back and relied on that.

It is not, cannot be, and never has been the law of Virginia that two corporations can get together, and one of them say, "You go out and act for me, but you won't be my agent." Their words say one thing and their actions say a different thing. They are bound by their actions regardless of what the words are. This is not the law, and I never heard any

proposition put out like that. Mr. Allen has the Coronado case. My recollection is that there was nothing there to go to. They said the hook-up between them was demonstrated beyond peradventure of doubt, but that the exercise of acts of agency was not shown.

Go ahead, Mr. Allen.

Mr. Allen: This instruction, if Your Honor please, would tell the jury that:

"Neither the defendants nor any one of them can be held liable for any acts that may have been done unless it be clearly shown that what was done was done by their agents in accordance with their fundamental agreement of association, that is to say of their constitution."

These gentlemen, for authority for that instruction, rely upon the Coronado case, and I submit most respectfully that there isn't anything in the Coronado case with reference to the issues involved in that case that authorize or even suggest the propriety of any such instructions as that.

The headnotes of the case are short, and the page 2415 } first headnote reads like this:

"Where the constitution of an international trade union provided that its constituents district organizations might order local strikes within their respective districts on their own responsibility, but that such strikes to be financed by the international union must be sanctioned by its executive board, held that liability for damage to property inflicted in a local strike called without such sanction by a district organization could not be imposed on the larger organization and that evidence of participation by its president was insufficient to show participation by the organization itself or to bind it on principles of agency."

The court didn't hold any such thing as is contended for in this instruction, but the court did hold that in as much as all this damage—and there was a powerful lot of damage done there as a result of the calling of an illegal strike, which was not sanctioned, not authorized, or ratified, I understand, by the international union. The constitution provided exactly as it does now, that if a local union called a strike, in order to hold the international union responsible for any of its consequences, they would have to apply to the international union for a sanction of the calling of the strike.

page 2416 } All of the damage that was done there was done in the conduct of an illegal strike called

without authority whatsoever. There is nothing in there applicable to a case here where everything that was done here, as we claim, was done in the commission of the tort of running our people off the job by intimidation, threats, coercion, and offers of violence, making our people leave the job and engendering such fear, putting them in such fear as to cause them not to return.

That sort of thing is not covered in their constitution in any way, shape or form.

Moreover, District 50 wasn't in effect at that time, had never been organized. District 50 was organized in 1936 and according to instructions which you have indicated that you will give under the law as we think it is applicable to this case, if the jury believes that District 50 was the agent of these unions, and indeed we expect to rely on the constitutions and the rules of District 50 and the rules of the United Construction Workers, and particularly the constitution of the United Mine Workers, together with a lot of other evidence to show that District 50 was the agent and the United Construction Workers was the agent.

Following that up further, as you have indicated in the instructions that you will give, if these agents of District 50 were acting within the scope of their employment

page 2417 } in representing District 50, and United Mine Workers were using District 50 for carrying out the purposes of organizing the unorganized, that in itself under the Kentucky law, which is applicable in this case, is all the ratification that you need, is all the authority that you need. You don't go back to the United Mine Workers constitution at all, and this case has no application because it involves nothing on earth but the destruction of a lot of property in the course and as a direct result of that local union calling a strike which was never sanctioned or approved under the United Mine Workers Constitution.

The other three paragraphs of this, which are short, simply deal with the application of the antitrust laws to the situation, and whether or not on this case enough evidence was introduced to bring this case within the antitrust laws, that is, enough evidence to show that interstate commerce was involved. That is all there was to the case. I see no application whatsoever of what was said in the Coronado case. It is too long to read any more.

Mr. Mullen: Have you found one that is too long?

Mr. Allen: I mean to read again. This is a suit for damages as a result of conspiracy—

Mr. Robertson: You said you were not going to read it.

Mr. Allen: I am not going to read it.
page 2418 } On the face of it, as we have repeated, aside
from what I have said a moment ago, it just
can't be the law that they can enter into written contracts
between themselves, and it makes no difference what the
agent does within the scope of his employment, the principal
is not liable for the written contracts.

The Court: Gentlemen, the Court will refuse Instruction "I".

Colonel Harris: We take our exception.

The Court: Your exception is noted.

(Brief recess.)

Mr. Robertson: Judge, we come now to the defendants' Instruction "J".

(Defendants' Instruction J follows:)

"The jury is instructed that:

"A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

"(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff was wronged by the acts of that defendant.

page 2419 } "(b) No damages can be awarded unless you also find that
the plaintiff was actually damaged; that the damage
was directly and proximately caused by the
alleged wrongful acts of one or more of the defendants,
and that such damage was intended by one or more
of the defendants or could reasonably have been foreseen as
a result of its wrongful conduct.

"(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

"(d) The plaintiff has the burden of proving with reasonable certainty the net profits that it claims as damages. From its gross profits must be deducted all expenses of every kind (including taxes other than income taxes) properly chargeable to the earnings of such gross profit. If you cannot determine from the evidence with reasonable certainty such deductions, then you cannot determine with reasonable certainty the plaintiff's net profits and you cannot award any

damages based on the net profits the plaintiff claims it should have earned.

"(e) If you believe that Virginia Mechanical Corporation would have done any part of the work for which the plaintiff is claiming damages, you must from the evidence determine with reasonable certainty the part of such work that Virginia Mechanical Corporation would have done and deduct such part from the plaintiff's claim. If you cannot do so, you cannot award any damages based on work the page 2420 } plaintiff claims it would have done.

"(f) There is no evidence that the plaintiff had a reasonably assured gross earning capacity in Kentucky and West Virginia upon which you can award damages for future earnings based upon a gross profit of cost plus 5%.

"(g) If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damage caused by the wrongful conduct of that defendant, unless you also find from the evidence that the defendants acted in concert to injure the plaintiff."

Mr. Robertson: I will suggest a few words as I go along and then I think we can shorten the criticism of it some.

"The jury is instructed that:

"A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this case you shall be governed by the following:

"(a)"—That ought to be "*No compensatory damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff was wronged by the acts of that defendant.*"

I don't know what they mean by "wrong." page 2421 } We will come back to that.

"(b) *No compensatory damages can be awarded unless you also find that the plaintiff was actually damaged; that the damage was directly and proximately caused by the alleged wrongful acts of one or more of the defendants, and that such damage was intended by one or more of the defendants or could reasonably have been foreseen as a result of its wrongful conduct.*"

Of course that is just dead wrong, and it confuses damages resulting from the tort with damages resulting from a con-

tract. It doesn't have to be intended. It doesn't have to be foreseen. You just have to remember the Squibb case to know that that is not the law.

"(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

"(d) The plaintiff has the burden of proving with reasonable certainty the net profits that it claims as damages."

You ruled on that yesterday. You don't have to prove net profits; it is profits. And they may argue what is net and we may argue what is net, and there is the whole field for argument open before you. The Court ruled on that yesterday.

"From its gross profits must be deducted all page 2422 } expenses of every kind (including taxes other
than income taxes) properly chargeable to the earning of such gross profit."

That is not the law. It is against the ruling of the court when it declined to make them produce their income tax returns and other tax returns. It is a matter that they can argue to the jury under the instruction which you have already given. Of course they are entitled to the converse of the instruction the Court has said he would give the plaintiff on contingent damages. They are entitled to the converse of that but they are not entitled to an instruction that is contradictory to that ruling.

"If you cannot determine from the evidence with reasonable certainty such deductions, then you cannot determine with reasonable certainty the plaintiff's net profits and you cannot award any damages based on the net profits the plaintiff claims it would have earned."

What I have said applies to that.

"(e) If you believe that Virginia Mechanical Corporation would have done any part of the work for which the plaintiff is claiming damages, you must from the evidence determine with reasonable certainty the part of such work that Virginia Mechanical Corporation would have done and deduct such part from the plaintiff's claim."

That doesn't even leave that question to the jury. Coleman

page 2423 } Andrews said it was good accounting principle and practice to lump them under the circumstances of the existence of those two companies, and they have introduced their exhibit, after all this hue and cry came up I think about the difference between \$58,000 and \$56,000. They can argue all that to the jury, but it has to be left as a jury question.

“If you cannot do so, you cannot award any damages based on work the plaintiff claims it would have done.”

That just violates every principle of law which the Court has given in the other instructions on damages.

“(f) There is no evidence that the plaintiff had a reasonably assured gross earning capacity in Kentucky and West Virginia upon which you can award damages for future earnings based upon a gross profit of cost plus 5 per cent.”

That is contrary to what the Court has already ruled. We used the expression here yesterday in the nature of good will; it is an expectancy that the same old customers will come back to do business at the same old stand. They had 28 months of work which netted them at the rate of \$28,000 a year.

“(g) If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damages caused by the wrongful conduct of that defendant, unless you page 2424 } also find from the evidence that the defendants acted in concert to injure the plaintiff.”

If Your Honor please, as I said before—

Mr. Fred G. Pollard: Mr. Robertson, may I suggest to the court that if we take up each paragraph by paragraph and clear them out of the way I think—

Mr. Robertson: I am at the end of this now.

Mr. Fred G. Pollard: —I think it would be easier.

The Court: All right, we will do that.

Mr. Robertson: I will finish what I had to say, Your Honor, and then I will turn it over to Mr. Allen.

They are entitled to an instruction on damages which is the converse of the instruction which you have given to the plaintiff. To put it the other way, the plaintiff is entitled to a damage instruction which is the converse of the damage instructions for the defendants. This instruction here is so

totally in violence of every rule that the Court has announced the Court will follow in our instructions on damages, it seems to me the instruction has to be totally rewritten. I will ask Mr. Allen to continue.

Mr. Pollard: Your Honor, as I understand we will take them up one by one.

The Court: If that is what you prefer to do, if it won't be confusing.

Mr. Allen: As I understand it, this instruction page 2425 } tion is offered as a whole as instruction J. There are so many things that are just palpably wrong on the face of the instruction, and as I take it the Court would have to refuse the instruction as to some of these because some of these paragraphs direct a verdict. There is no obligation on the court to reform the instruction and no obligation on us to reform it. However, I will take up the instruction paragraph by paragraph and discuss it if the Court wants me to do that.

Mr. Fred G. Pollard: What I meant, Mr. Allen is, after you have finished criticizing paragraph (a), we would like to answer, and then you close on it and then we will pass on that paragraph.

Mr. Allen: You say, "No compensatory damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff was wronged by the acts of that defendant." That is what bothers us there. Instead of "wronged," why don't you say "find that the plaintiff is entitled to recover against that plaintiff"? That "wronged" business comes in there and nobody knows exactly. It doesn't say legal wrong, moral wrong, any sort of wrong. I don't know what he is talking about.

You see, this instruction, Your Honor, deals with both classes of damages, because there is no distinction between them. When you are talking about compensa- page 2426 } tory damages you ought to say so. If you will change that to read "No compensatory damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff is entitled to recover against that defendant." That would include everything that we would have to prove to entitle us to recover against that defendant. I think that would cure that particular paragraph.

The Court: Any objection to that change?

Mr. Fred G. Pollard: No objection to the last change, Your Honor, but I don't see the necessity for inserting the word "compensatory" damages, because unless the jury first believes from the evidence that the defendants—

Mr. Allen: Say, "No compensatory or punitive—"

Mr. Fred G. Pollard: No, just say "No damages—"

Mr. Mullen: It covers them both.

Mr. Allen: Under the Kentucky law they can award punitive damages alone, and no compensatory damages.

Mr. Fred G. Pollard: This doesn't say anything about that, Mr. Allen. This says that no damages can be awarded against any defendant unless you first find as a fact from the evidence, and then use your language.

Mr. Allen: That is right. I think that would do it.

The Court: I don't think it is necessary to put "compensatory" in there.

page 2427 } Mr. Fred G. Pollard: What is your language, Mr. Allen?

Mr. Allen: Reading your language, "unless you first find as a fact from the evidence that the plaintiff—" Cut out the rest of it, "was wronged by the acts." "Unless you first find that the plaintiff was entitled to recover against that defendant."

The Court: In lieu of "was wronged by the act of", insert "is entitled to recover against."

Mr. Fred G. Pollard: We have no objection to that, Your Honor.

The Court: All right.

Mr. Allen: The next one, "(b) No damages can be awarded unless you also find that the plaintiff was actually damaged."

Mr. Moore: That should be compensatory.

Mr. Allen: "That the damage was directly and proximately caused by the alleged wrongful acts of one or more of the defendants, and that such damage was intended by one or more of the defendants or could reasonably have been foreseen as a result of its wrongful conduct—" That certainly should be inserted.

Mr. Fred G. Pollard: May I make a suggestion, Mr. Allen, which I think will correct that.

page 2428 } The Court: All right, what is your suggestion, Mr. Pollard?

Mr. Fred G. Pollard: Strike out in line 2 the following language: "The plaintiff was actually damaged; that—"

Mr. Allen: "No damages can be awarded unless you also find that the damage was directly and proximately caused—"

The Court: That is in paragraph (b), line 2. He proposes to delete "the plaintiff was actually damaged; that—" Do I understand you correctly, Mr. Pollard?

Mr. Fred G. Pollard: That is right.

The Court: That is the first six words in the second line.

Mr. Allen: Then it would read "No damage can be awarded unless you also find that the damage was directly and proximately caused by the alleged wrongful acts of one or more of the defendants."

Mr. Moore: You would have to stop there.

Mr. Allen: The rest of that absolutely will have to come out, Your Honor, because it is in direct contradiction with reference to damages.

Mr. Robertson: Mr. Moore has the case on that.

Mr. Allen: The law is not such as is stated in the last clause of that paragraph (b).

Mr. Moore: It is the same case of *Kentucky* page 2429 } *Heating Company v. Hood*, which we cited yesterday, which explains fully the difference between damages in a tort action and the damages following from a contract violation. The Court says: "It is not material," referring to a tort, "whether it was in the contemplation of the wrongdoers that loss of business or profit would result to the injured party. In action for a breach of contract the rule generally held to is that only such damages can be recovered as are actually sustained or such as is reasonable to conclude from within the contemplation of the party at the time the contract was entered into. There is a wide difference between the rights and remedies allowed under the one case and the other."

Then referring to a tort, they say, "It is the wrongful act and the consequences that naturally result from it that the law looks after and holds the wrong-doer responsible for. A person who commits a tort like this is liable for all the damages that naturally flow from and are the result of this wrongful act. Although he may not at the time have given any thought or have anticipated that injurious consequences would follow, it is no excuse or defense for the wrongdoer that he did not commit any wrong or did not know that any injury or loss would ensue."

I think that clearly shows that everything from "and" on is wrong.

Mr. Allen: Your Honor will recall that in page 2430 } discussing our damage Instruction No. 10 you gave this language, part of which was used as the result of a suggestion from Colonel Harris there. You said, "The plaintiff has the right to prove the nature of his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the proximate consequences naturally and directly traceable thereto."

The word "proximate" was put in there at the suggestion of Colonel Harris. Of course he does not waive his objection

to that instruction by making the suggestion. I am simply referring to this to show you that very matter was discussed and that Your Honor passed upon the propriety of it in passing on our Instruction No. 10. Your Honor did not follow the suggestion about reasonably could have foreseen as a result of its wrongful conduct or that the damage was intended by the defendants.

As a matter of fact, that is not the law anywhere, in Virginia or Kentucky or anywhere else so far as I know.

The Court: All right, Mr. Pollard.

Mr. Fred G. Pollard: Your Honor, the rule in contract cases is that a man is liable for his intentional conduct or that which was the result as being reasonably within the contemplation of the parties at the time they entered into the contract. In a tort a person is liable for his intentional acts or any result that might reasonably be foreseen page 2431 } as a result of his tortious conduct.

Mr. Moore: Proximate cause is the only test for tort damage. Everything proximately caused by the tort, you are responsible for. That is the law in Kentucky and everywhere else.

Mr. Allen: That suggests a fundamental proposition of tort law.

Mr. Fred G. Pollard: Do you have anything?

Colonel Harris: I don't care to add anything.

The Court: Is there anything you wish to add?

Mr. Fred G. Pollard: No, Judge.

The Court: Gentlemen, I think the last three lines in (b) beginning with "and" should be cut out, putting a period after "defendants."

Mr. Fred G. Pollard: We except to your Honor's ruling on that.

The Court: All right.

Mr. Robertson: We think (c) is all right.

Mr. Lowden: How about the word compensatory being inserted there?

Mr. Mullen: He has passed on that.

Mr. Lowden: I don't know that he has.

Mr. Robertson: "The compensatory damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or con- page 2432 } tingent compensatory damages are not recoverable."

Go ahead on that, Mr. Lowden. I think you have it.

Mr. Lowden: Your Honor was talking about (b) and we skipped to (c). If I may go back a minute, certainly punitive

damages are not directly and proximately caused. I think it is misleading to the jury to let that be all-inclusive. I don't think there has been any such finding in connection with punitive damages.

Mr. Robertson: Punitive damages are intended to punish, not to compensate, but in Kentucky it is to compensate and also to punish.

The Court: We struck it out in (a).

Mr. Allen: You struck it out in (a), but it is obliged to be there in (b), Judge, because punitive damages don't have to be proximately caused or anything of the kind. Punitive damages are awarded on an entirely different theory.

The Court: Do I understand that in Kentucky you can award punitive damages and not compensatory damages?

Mr. Moore: That is what they did in that Ritchel case we cited yesterday.

Colonel Harris: You would have to award at least nominal damages.

The Court: You do in Virginia, don't you?

Mr. Allen: Oh, yes. Not only that, in Virginia there has to be a reasonable relation. We discussed that page 2433 } yesterday.

The Court: As I recall from the arguments we have had here, it is not necessary to award compensatory damages in order to award punitive damages. If that is the law, of course it is different from what the law is in Virginia.

Mr. Robertson: They said the reason was that in Kentucky they considered in a sense it was compensatory and also it was punitive.

Mr. Fred G. Pollard: Are you through?

Mr. Lowden: Not quite.

Mr. Allen: I don't know how we got into this.

Mr. Lowden: If we are correct, (b) is a misleading instruction.

Mr. Allen: I was talking about the irregularity of the argument.

The Court: If you gentlemen are correct in your views, it appears that "compensatory" should be added.

Mr. Moore: Here is the quote, if you would like to hear it.

The Court: Yes, read it.

Mr. Moore: This is *Louisville and Nashville Railway Company v. Ritchel*, 147 Southwest 411. In that case punitive damages only were awarded, no compensatory damages. The Supreme Court of Kentucky stated:

"As the jury, even under the instructions as page 2434 } given, might have awarded compensatory damages, though nominal in amount, and under a proper instruction might have awarded damages for humiliation and mortification of feeling, we conclude that the fact that the jury returned a verdict for punitive damages only furnishes no just reason why the verdict should not be allowed to stand, since under the rule in force in this state, punitive damages when allowed, are given as compensation to the plaintiff, and not solely as punishment of the defendant."

That is cited in the last case of *Brink v. Kennedy*, 151 S. W. (2d) 58.

Colonel Harris: Are you through?

Mr. Allen: Those Kentucky cases do say—what they mean by it is another question—they do say that punitive damages must bear some relation to the injury and the cause thereof, which gets it over again to show that unless the plaintiff is entitled to recover, unless the plaintiff has made out a cause of action, then he can't recover any compensatory or punitive damages, either. But if the plaintiff has been injured as the result of the wrongs of the defendant, the jury doesn't have to award any compensatory damages. They can award it all in punitive damages which is in part compensation. Do you see what I mean?

The Court: Yes, I see your point.

Colonel?

page 2435 } Colonel Harris: Which is not a correct statement of the decision that they have quoted. We have that decision in our brief, and if you will take the first part that Mr. Moore quoted, the language of the opinion is this: "The correct rule, we think, is that if a right of action exists—that is, if the plaintiff has suffered an injury for which compensatory damages might be awarded, although nominal in amount—he may in a proper case recover punitive damages." And he must be entitled, as I read that sentence, to recover compensatory damages although the amount does not have to be in excess of a nominal amount. If Your Honor will look at the exact wording of that.

Mr. Robertson: You have it there.

Mr. Moore: It is in our brief on page 16.

Mr. Allen: There is no difference between you and me, Colonel, on that, except I don't agree with you that the jury have to allow any compensatory damages, but I do agree with

you that they have to find that the plaintiff has suffered some injury.

Mr. Fred G. Pollard: Which team has the ball right now, Judge?

The Court: I don't know. I believe you had it, didn't you, Colonel Harris (laughter)?

Mr. Fred G. Pollard: Your Honor, I just want to point this out. I think the Colonel is entirely correct, page 2436 } and what he said would apply if we didn't have the first paragraph in there. But by putting the first paragraph in there we state that this entire instruction applies to damages based on loss of future profits, and then we go on to say, "In this connection you shall be governed by the following:" Punitive damages has no place in this instruction.

Mr. Lowden: That is fine. That is all we ask. You can say this is an instruction on compensatory damages, and that is o. k.

Mr. Fred G. Pollard: This is an instruction on the plaintiff's claim for damages based on loss of future profits, and that is all there is to it.

Mr. Robertson: Then there ought to be "compensatory" before damages everywhere.

The Court: If it is damages for future profits, it can be only one type, and that is compensatory.

Mr. Fred G. Pollard: That is correct, and therefore there is no need to mention it.

Mr. Robertson: Therefore, to avoid confusion of the jury it should be inserted.

Mr. Pollard: The plaintiff has no right to write our instruction. If we have made an erroneous statement of the law they can object to it, but as long as we set out at the beginning that this is an instruction on the plaintiff's claim for damages based on the loss of future profits and say, "In this connection you can be governed by the following," we don't have to mention compensatory damages, page 2437 }

Mr. Lowden: I don't think the statement was correct. I don't mean to interrupt, but you said that—

The Court: Have you all finished? I will let you close.

Colonel Harris: I have nothing more to say.

Mr. Mullen: No.

The Court: All right, Mr. Lowden.

Mr. Lowden: I don't think it is right that because this is based on future profits, there couldn't be any punitive damages for that, because if we are correct, punitive damages may be compensatory and they might decide, as I understand

the law, not to give us future profits as a compensatory item but they might give us some punitive damages to take care of it. Therefore, the thing is a little more complicated.

The Court: The plaintiff has an instruction on damages which describes that, haven't you?

Mr. Allen: Yes, but we don't want this instruction to conflict with ours.

The Court: I understand that, but is there any conflict when the first paragraph states that "A part of the plaintiff's claim for damages is based on the loss of future profits," and so forth.

Mr. Robertson: It seems to me, Your Honor, page 2438 } in order to make it clear, "compensatory" should be put in front of every "damages."

Mr. Allen: Or put "No such damages."

The Court: How about adding "No such damages"?

Mr. Fred G. Pollard: All right.

Mr. Lowden: He has it in the first paragraph.

Mr. Allen: The first paragraph (a) doesn't mention profits.

The Court: It does mention profits, future profits.

Mr. Allen: In paragraph (a)?

The Court: No, but the first paragraph.

Mr. Lowden: If he puts it in first paragraph, that, "A part of the plaintiff's claim for compensatory damages," then it would be all right, but don't you see, the first paragraph doesn't refer to compensatory damages, either. In fact, he doesn't use the word "compensatory" and place in the entire thing.

Mr. Moore: It is a matter of law that loss of profits is compensatory damages. It is confusing enough to the jury to have two different types of instruction without giving them a general instruction about what it can award.

Mr. Lowden: I don't think this instruction should do anything which will be confusing.

Mr. Fred G. Pollard: I don't see a thing confusing about it, Your Honor. If they want to put "such" in there—

Mr. Allen: "Such" wouldn't fill the bill because you don't mention compensatory at all.

Mr. Lowden: If you put compensatory up at the top, "A part of the plaintiff's claim for compensatory damages is based on," and then say "No such damages," I think you have gone a long way toward clearing it up.

Mr. Fred G. Pollard: They have an instruction which defines compensatory damages and another one which defines punitive damages. They say that punitive damages can be

awarded as compensation. All we are talking about in this instruction is future profits. I don't think that we ought to be put in the position where we have to take a position whether future profits are compensatory or punitive damages. We just want to talk about future profits, and we don't want to say anything about compensatory or punitive.

Mr. Robertson: May I ask you a question. Do you admit that we can argue to the jury that they can allow future profits either as compensatory or punitive damages?

Mr. Fred G. Pollard: Mr. Robertson, I will give you your own answer. I don't admit anything I don't specifically agree to.

Mr. Robertson: I ask the Court to put in there "A part of the plaintiff's claim for compensatory damages," and then down below put "No such damages."

page 2440 } Mr. Mullen: A part of the plaintiff's claim for damages." It doesn't confine it to the whole thing. It doesn't cut out your claim for punitive damages. "A part of the plaintiff's claim for damages is based on the loss of future profits." It is not exclusive.

The Court: I will leave it like it is. You can argue it. You have an instruction on future profits.

Mr. Mullen: How far have we gotten?

Mr. Lowden: I think we should except to the ruling of the Court on the ground that the instruction as written is confusing and does not accurately set forth the law.

Mr. Robertson: When you come to (a) are you going to say "No such damages"?

The Court: If you want that in there. Do you want "No such damages"? I don't know that it is necessary.

Mr. Robertson: I believe I will leave it out. Just leave it the way it is.

The Court: All right.

We are down to (d), are we not?

Mr. Allen: Yes.

The Court: All right, Mr. Allen.

Mr. Allen: "The plaintiff has the burden of proving with reasonable certainty the net profits that it claims as damages. From its gross profits must be deducted all expenses of every kind (including taxes other than income taxes) properly chargeable to the earning of such profit. If
page 2441 } you cannot determine from the evidence with reasonable certainty such deductions, then you cannot determine with reasonable certainty the plaintiff's net profits and you cannot award any damages paid on the net profits the plaintiff claims it would have earned."

That instruction is altogether in conflict with our instruc-

tion on damages which you have already indicated that you would give. It uses the term "net prohts," and I have not been able to find any decision in Virginia or anywhere else which uses the term "net profits." All the decisions say profits, profits, profits. The use of the term "net profits" in this instance would be wholly misleading and incorrect as a legal proposition because the damages here involved are those growing out of lump sum contracts and these cost plus 5 per cent contracts. According to our theory of the case, what is termed their gross profit is practically the net profit. If they will frame a proper instruction on their theory of the case, based on the testimony of Holt and the jury believes that, that would be quite a different proposition, but here they are asking Your Honor to practically direct a verdict on a disputed question of fact. All this business here about "expenses of every kind (including taxes other than income taxes) properly chargeable."

Mr. Robertson: Let's see if this would meet it: Make (d) read this way: "The plaintiff has the burden page 2442 } of proving with reasonable certainty the profits that it claims as damages." Strike out the next sentence completely. "If you cannot determine the profits from the evidence with reasonable certainty, then you cannot award any damages based on profits."

Mr. Allen: That is proper. That is what you have given in our instruction.

The Court: All right, gentlemen. That appears to be in line with the Court's ruling on yesterday. Of course I will be glad to hear from you gentlemen with reference to it.

Mr. Mullen: We didn't get it.

Colonel Harris: I went out to get a coat and didn't hear what was said.

The Court: We were discussing (d).

Mr. Robertson: Let me read the way I worked it out here:

"(d) The plaintiff has the burden of proving with reasonable certainty the profits that it claims as damages."

Then I strike out the entire next sentence: "If you cannot determine profits from the evidence with reasonable certainty, then you cannot award any damages based on profits the plaintiff claims it would have earned."

The Court: Then you cannot award what? page 2443 } Mr. Robertson: "If you cannot determine profits from the evidence with reasonable certainty—" Scratch out the next line and the first four words of the next line, making it read, "If you cannot determine

profits from the evidence with reasonable certainty, then you cannot award any damages based on profits the plaintiff claims it would have earned.

The Court: That strikes me as good law, but I will hear you in line with our conversation of yesterday.

Mr. Fred G. Pollard:

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page 2444 }

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In other words, we have a right in this case to have any damages confined to what the net loss to the plaintiff was, not his loss.

He says "I would have made 'X' dollars out there," but after he has paid certain costs for which he is not reimbursable, he would have a net to him of only "Y" dollars. He is only entitled to recover "Y" dollars, not "X" dollars, because if he had done the work he wouldn't have had "X" dollars in his pocket. He would only have had "Y" dollars, because "Y" dollars is what he would have had left after he paid the costs which were attributable to earning the gross profit.

The Court: That is what you will argue to the jury, is it not, that there was no profit, I believe you say?

Mr. Fred G. Pollard: We can argue there was no profit, but the jury has to be instructed that they should take into account the cost of earning the gross profit if they believe that there were costs in earning it.

Mr. Mullen: He had a maximum fee of \$12,000 on the tipple, but he said he only earned \$10,000, from his testimony. That is his profit. That doesn't take into consideration the controversy of overhead. That takes in direct costs which were not reimbursable on the job. He never got any net of \$12,000. He testified himself that he got a net of \$10,400 I think it was.

Mr. Robertson: That contract is clear out of the case now.

Mr. Mullen: I am using it to illustrate the principle. The principle is still in the case. He had another contract in which his five per cent amounted to \$12,000, but similar expenses had to come off and he still wouldn't have got even \$12,000. He would have gotten \$10,000.

Mr. Fred G. Pollard: May I illustrate it by bringing up this exhibit (indicating on exhibit). Here are these four contracts. Four of the last five from the bottom,

were all contracts on cost plus 5 per cent. On this contract his fee was \$12,000. This was the net after direct expenses for which he is reimbursable, and the gross profit was only 3.74. This job was on a cost plus 5 per cent, and the net was 4.76. This was on cost plus 5 per cent and the gross was 4.76. And the same for this. So even where he had a contract on cost plus 5 per cent, his own books show that the profit is something less than 5 per cent. The jury has certainly got to be instructed that they are to deduct from the gross fee, cost plus 5 per cent, whatever they think the net is. Even this isn't the net. This is just the gross. Then the question for argument is whether you apply overhead to the gross. Before you get the gross you have to reduce the 5 per cent to something less than 5 per cent, and then you have another argument as to whether you take the gross and reduce it further for overhead purposes.

Mr. Robert N. Pollard: Referring to Defendants' Exhibit No. 70.

Mr. Robertson: Are you through?

Mr. Fred G. Pollard: Yes.

page 2447 } Mr. Robertson: If Your Honor please, it seems that we are arguing here what we were arguing *ad infinitum*. We have it all defined in the damages instruction. The very case that Mr. Pollard was reading from was a contract case, not a tort case. Even that case supports what we are saying here. Read that part of it.

Mr. Moore: First of all it is interesting to note that Universal Moulded Products had been in business for only five months and was a far cry from being an established business like Laburnum. The court makes quite a bit out of that. Here at page 570 of the opinion they say:

"When, however, it is certain that substantial damage has been caused by the breach of a contract, and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then there can rarely be any good reason for refusing all damages due to the breach merely because of that uncertainty." (*E. I. DuPont de Nemours & Company v. Universal Moulded Products Corp.*, 191 Va. 525, p. 570.)

Mr. Fred G. Pollard: Your instruction says that.

Mr. Robertson: I thought you were through. When are we going to end this thing?

The Court: Are you through, Mr. Pollard?

Mr. Fred G. Pollard: The only thing I wanted to correct Mr. Robertson on was my recollection of what page 2448 } Your Honor said yesterday on the question of whether or not net profits should appear. You

told us that this was their instruction and it was up to us to draw up our instruction on our theory of the damages, and that that would be considered when we offered it. I thought the question was finally settled yesterday.

Mr. Robertson: This is all I have to say. Our term used the word "profits." It didn't say gross or net. The court said within the term "profits" each side can argue its own evidence.

Mr. Allen: What do you claim, Mr. Pollard, under what you call their "non-reimbursable costs"? What are you claiming by the use of that term?

Mr. Fred G. Pollard: Mr. Bryan testified with respect to the contract of October 28 that he collected a fee of \$12,000 but that his books only showed a gross profit of \$10,200 plus, because there were certain direct expenses for which the plaintiff was not reimbursable. We think that if this other work had been undertaken, the jury should be instructed to take into consideration any amounts that they think would have been direct costs for which the plaintiff was not reimbursable.

Mr. Allen: This contract that you referred to is out of the case, and you are using that just as an illustration.

Mr. Fred G. Pollard: That is correct.

page 2449 } Mr. Allen: Where is that any evidence that there were any non-reimbursable costs on these other five per cent jobs or that there would have been any on the job that they agreed to give?

Mr. Fred G. Pollard: On cross examination your accountant testified that he couldn't say whether there would be or whether there would not be, but in view of the past experience on other jobs he presumed that there probably would be some.

Mr. Allen: And Mr. Andrews testified that—

Mr. Fred G. Pollard: That he knew nothing about the facts.

Mr. Allen: He testified that that was practically all, that the gross profit was the net profit.

Mr. Fred G. Pollard: You can argue that.

Mr. Allen: And Mr. Bryan testified to the same effect. You have no evidence to show under those circumstances that there were any reimbursable items there. So I think the instruction that Mr. Robertson suggested is exactly correct and leaves it for both sides to argue anything they want to under that.

Mr. Mullen: May I get the ruling of the Court on (d) of Defendants' offered Instruction J?

The Court: The ruling of the Court was in page 2450 } line with the suggestion of Mr. Robertson, which appears in the record.

Mr. Lowden: May I ask a question? As I understand it, the court ruled that it is willing to put clause (d) in as amended by Mr. Robertson. Of course if they don't want it to go in at all, they have a right to withdraw that.

The Court: Certainly.

Mr. Lowden: So is it going to be in that shape?

The Court: The ruling is that clause (d) as written will be refused, but the Court will allow clause (d) as suggested by Mr. Robertson. Did you get your exception in, gentlemen?

Mr. Fred G. Pollard: We except to Your Honor's ruling.

Mr. Allen: May I say here for fear I may forget it, when we get through with this instruction and it is decided the form in which you will give it, I would like for them to say whether they will accept it in that form and of course save their exception, or whether they would rather not have it at all, you having deleted some of it. We are not going to ask for it as our instruction.

Mr. Mullen: We don't have to say that, it becomes the Court's instruction.

Mr. Robertson: If Your Honor please, I think we can make (e) very short. I think in view of the conflict in the testimony of the accountants for the parties, the defendants are entitled to have a jury issue as to whether or not the earnings of the Virginia Mechanical Corporation should be drawn out, if there are any. You remember Holt said it was bad accounting practice to dump them all in together, and Baird and Coleman Andrews said it was good accounting. It seems to me that that could be corrected in this way. I am just suggesting this, and I haven't even submitted it to my associates here. They may not think I am right.

"If you believe that Virginia Mechanical Corporation would have done any part of the work for which the plaintiff is claiming damages, you may deduct such part from the plaintiff's claim."

In other words, I think they have a right to have that issue put to the jury. My associates say they don't agree with me. Go ahead, Mr. Allen.

Mr. Allen: I think the proposition here is this: I think Your Honor has passed on this in another connection. There isn't any question on earth about the fact that one corpora-

tion can use another one as an instrumentality for the furtherance of its business. If Mr. Bryan's testimony is correct and we would be entitled to an instruction on that, they would be entitled to one to the contrary if there is evidence to support it. If Mr. Bryan's testimony is correct and if it is believed by the jury, he was simply using the Virginia Mechanical Corporation as a matter of convenience in page 2452 } carrying on the business of the Laburnum Construction Corporation. That question came up here, Your Honor, since my memory is refreshed, the other day in some way. These gentlemen made a motion to strike out the evidence as to Virginia Mechanical Corporation. It came up here in some connection, and Your Honor decided that you thought that one corporation had a right to use another one like that. My mind is—

Mr. Fred G. Pollard: Foggy.

Mr. Allen: I know that came up in some connection.

Mr. Robertson: Mr. Moore read the rule that anybody, even though insane, can be the agent for a corporation. He used the word "insane" in the same tense.

Mr. Allen: That is right. If the jury believes from the evidence that the plaintiff was using the Virginia Mechanical Corporation as an instrumentality in conducting the plaintiff's business, then anything that the Virginia Mechanical Corporation might have earned belongs to the plaintiff. If they want an instruction along that line and the jury disagrees with Mr. Bryan's evidence, then they should deduct any profits that they claim might have been earned by the Virginia Mechanical Corporation. That is the only thing that I see for that instruction.

Mr. Moore: Couldn't you fix it along this line?

The Court: Suppose we recess for lunch and page 2453 } you gentlemen write out something you have in mind and I will consider it when we come back.

Mr. Mullen: Yes, I want to answer that.

(Whereupon, at 1:00 o'clock p. m. the conference was recessed until 2:15 o'clock p. m. the same day.)

page 2454 } AFTERNOON SESSION.

2:15 p. m.

Mr. Robertson: If Your Honor please, I think Mr. Moore has a suggestion on paragraph (3) which he has been working on.

Mr. Fred G. Pollard: Your Honor, shouldn't we state our

position on this instruction before we start considering any substitutes?

The Court: As I understood, they were opening and were suggesting that in their opening statement. Then, of course, you can reply to it.

What is it, Mr. Moore?

Mr. Moore: This is just a rough draft. We would suggest that section (e) read as follows:

"If you believe from the evidence that the profits, if any, of the Virginia Mechanical Corporation should not be included in the profits, if any, of the Plaintiff, then you must deduct such profits from the Plaintiff's claim."

That, we believe, squarely puts before the jury the conflicting evidence whether or not to include the profits of the Virginia Mechanical Corporation in the claim of Laburnum. There has been testimony by their accountant, Mr. Holt, that it should be a separate item; and our two accountants testified that it should be included. We think the jury should be permitted to decide that conflict of fact.

Mr. Fred G. Pollard: Would you read that again?

Mr. Moore: "If you believe from the evidence page 2455 } that the profits, if any, of the Virginia Mechanical Corporation should not be included in the profits, if any, of the Plaintiff, then you must deduct such profits from the Plaintiff's claim."

The Court: Do you gentlemen have any further observations to make?

Mr. Robertson: I don't think I have.

Mr. Allen: No.

The Court: All right, Mr. Mullen:

Mr. Mullen: If Your Honor please, the inclusion of the earnings of a subsidiary in those of the parent corporation may be an accounting principle. It is not a legal principle in a law case on the question of ownership. They are separate entities. The courts do not overlook that or say that they are not different things.

We have the same thing in Federal tax law. They can make either a separate or a consolidated tax return. They are recognized as separate identities. You can't go behind the identity of the corporation and say it is something else or a part of something else. The cases are perfectly clear on that point. While their profits may be included in the profits of the parent corporation, they are included as a dividend, but they are not included in the profits from the

work of the parent corporation. They must be excluded from that.

page 2456 } That revised wording would leave it as a legal question to be decided by the jury, when this is a positive question of ownership based on separate identity, recognized in the law everywhere.

The second thing is that they made no claim in the Notice of Motion for any profit, loss, or damage done to the Virginia Mechanical Corporation. They now come in and claim that is part of their damages. They have taken us by surprise, and not having given us notice of that, they have no right to claim it in this action.

Mr. Fred G. Pollard: Your Honor, one of the cases we have on agency is a Kentucky case, *Southeastern Greyhound Lines v. Hardins Administrators*, 136 S. W. (2d) 42. In that case the Court said:

"We have often held that where one corporation was but the *alter ego* of another or but a conduit through which one operated as by way of pretense or deceit in the perpetration of a fraud, the courts would look through the fiction and place the responsibility where it belongs."

But we have had no notice in this case in the Notice of Motion that they were going to come in here and try to claim the profits of Virginia Mechanical Corporation.

All this instruction says is that if it believes any part of the work would have been done by Virginia Mechanical Corporation, you must from the evidence determine page 2457 } with reasonable certainty what part Virginia Mechanical would have done, and deduct that from the Plaintiff's claim.

You have already approved, in an earlier instruction, Your Honor, in Defendants' Instruction C, that the damages claimed by the Plaintiff must be capable of being ascertained with reasonable certainty. All this instruction adds to that is that if you cannot do so, determine with reasonable certainty, you can't award damages based on the Plaintiff's claim for work it would have done. If you can't determine one with reasonable certainty, you certainly can't determine the other portion.

Mr. Mullen: As Mr. Pollard indicated, the only case in which they do go behind the corporate identity is in case of fraud, where one corporation is sued for fraudulent purposes by another.

Mr. Fred G. Pollard: Pretense or deceit.

Mr. Mullen: Is there anything you want to say, Colonel?

Colonel Harris: There is nothing I wanted to add. Mr. Mullen made the argument that I had in mind.

Mr. Allen: If Your Honor please, the question here involved is just as simple as it can be. We believe upon the evidence we are entitled to an instruction, if we ask for it, that if the jury shall believe from the evidence that the Virginia

Mechanical Corporation, a wholly-owned subsidiary of Laburnum, was used by Laburnum as an agency or instrumentality to carry on a certain part of Laburnum's business, then any loss to the Virginia Mechanical Corporation would be a loss to Laburnum. There can't be any doubt about that proposition. One corporation may use another as an agent. It can use an individual as an agent.

Mr. Mullen said that no mention was made of Virginia Mechanical Corporation in the Notice of Motion. Of course not. No mention was made of Mechanical Corporation for the very reason that the damages to Mechanical Corporation or losses to Mechanical Corporation were a part of the losses to Laburnum.

Moreover, we are suing here for a tort, and whatever damage, direct or proximate, sustained by Laburnum through this tort is recoverable. It may have come indirectly through another corporation. It is nevertheless a loss to Laburnum.

Mr. Bryan testified positively that this company was organized solely for the purpose of carrying on a part—and he described the part—of the business of Laburnum, and he has testified positively that this corporation did not do work on any jobs except Laburnum jobs. It did no outside work.

Mr. Mullen: Let me interrupt you there. He said it did most of its work, most of the work of the Mechanical Corporation.

page 2459 } The Court: Have you checked the record on that?

Mr. Allen: We checked the record on that, and it was read here.

Mr. Fred G. Pollard: It has not been read here.

Mr. Mullen: It hasn't been read here.

Mr. Allen: I checked the record on it when it was brought up.

Mr. Mullen: I asked the question, and he said most of the work, the main work, was for Laburnum.

Mr. Allen: He used another term there, Mr. Mullen, which meant practically all.

Mr. Mullen: You are now saying exactly what I said. He said some of it was done outside.

Mr. Allen: I think I made a note of it here the other day.

The Court: I may be mistaken, but my recollection is that he didn't say all the work was done for Laburnum.

Mr. Allen: He didn't use the term "all," but he didn't use the term "most." He said practically all.

Mr. Bryan was on the stand.

Mr. Mullen: He was on the stand four or five days, so it is pretty hard to find it.

Mr. Robertson: I think what it boils down to, according to my recollection, that was *de minimis*, didn't amount to anything, the part he didn't do for Laburnum.
page 2460 } It was toward the end of his testimony.

The Court: Was it in answer to a question on cross examination? Do you recall?

Mr. Mullen: I think so, yes.

Mr. Lowden: I think it was on rebuttal. That is my recollection.

Mr. Mullen: His rebuttal was very short.

Mr. Lowden: See if it wasn't the last day.

Mr. Robertson: I think it was the last day.

(Discussion off the record.)

Mr. Allen: This is not the place I was talking about, but here is where he did say something about it. This isn't what I was talking about, but this does deal with it, and I want to look the other place up, too.

Mr. Fred G. Pollard: What page are you on?

Mr. Allen: Page 1990:

"By Mr. Robertson:

"Q. What kind of work, if any, does Virginia Mechanical Corporation do for Laburnum Construction Corporation?

"A. Virginia Mechanical Corporation has agreements with the plumbers and steamfitters local union, the sheetmetal workers local union, the electricians local union, and they handle mechanical work in which Laburnum Construction Corporation is interested. That is the purpose of it.

"Q. Do the profits and losses from Virginia
page 2461 } Mechanical Corporation go back eventually to
Laburnum?

"A. Certainly."

Then it goes off on something else here.

"A. All the jobs that the Virginia Mechanical Corporation has had of any size or consequence have been Laburnum jobs.

"Q. Is that why they are included in there?

"A. That is right. They are treated as a part of the Laburnum jobs."

Mr. Mullen: It doesn't say "all."

Mr. Allen: Well, it comes so near saying "all." "All the jobs that the Virginia Mechanical Corporation has had of any size or consequence have been Laburnum jobs."

Just as Mr. Robertson said, you can certainly construe that to mean that what Virginia Mechanical Corporation did, if anything, that was not Laburnum work, was *de minimis*.

Mr. Robertson: You have no evidence of any kind that they did work for anybody else. He said everything of any consequence, and they elected not to pursue it any further. So you have no evidence there of anything that is worth a nickel that wasn't for Laburnum.

Mr. Allen: He says that eventually all the profits go back to Laburnum, profits or losses.

Mr. Mullen: The stockholders or—

Mr. Allen: He says it goes to Laburnum.

page 2462 } Mr. Mullen: The stockholders or Plaintiff?

Mr. Robertson: You didn't bring that out. You have the accountants one way, and we have another. We propose now to leave it to the jury.

Mr. Fred G. Pollard: It is not an accounting, Your Honor. It is a matter of the law.

Mr. Allen: It is a matter, Your Honor, of whether the loss or profit of Virginia Mechanical Corporation is reflected in the loss or profit of Laburnum, and Mr. Bryan says positively it is, and that is that. So if Mechanical sustains a loss, Laburnum sustains a loss, and that is sufficiently direct.

Mr. Robertson: According to the accountants' testimony, the jury has a right to take it one way or the other.

Mr. Fred G. Pollard: May I make a statement, Your Honor?

Laburnum is the sole owner of the stock of Virginia Mechanical Corporation, and to allow it to recover any profits or losses of Virginia Mechanical Corporation in this proceeding would in effect be to allow Laburnum Construction Corporation to bring a stockholders' suit on behalf of Virginia Mechanical Corporation; and as Your Honor well knows, there are many conditions precedent to allowing a person to bring a stockholders' suit. The argument that they
page 2463 } make would be the same situation as if U. S. Steel furnished steel for the job and Laburnum owned one share of stock in U. S. Steel. That is just how silly their argument is. They would say, "U. S. Steel lost profits be-

cause they didn't get to sell us the steel for the job, and we are a stockholder of U. S. Steel and we would have made some profits out of that." That is just how much sense their argument makes.

Mr. Allen: I believe we have the opening and closing.

All I have to say is that that instruction directs a verdict in their favor, regardless of the circumstances of the case, regardless of the facts testified to by Mr. Bryan, regardless of whether the jury believes that evidence and believes that Laburnum sustained a loss, as Mr. Bryan testified to there.

Mr. Robertson: And regardless of conflicting theories of accounting.

The Court: Gentlemen, I will not allow (e) as written.

Mr. Fred G. Pollard: We except.

The Court: But I will allow, in lieu thereof, the following:

"If you believe from the evidence that the profits, if any—"

Mr. Fred G. Pollard: Would you go a little page 2464 } slower, please, Judge?

The Court: "If you believe from the evidence that the profits, if any, of Virginia Mechanical Corporation should not be included in the profits, if any, of the Plaintiff, then you must deduct such profits from the Plaintiff's claim."

I don't believe you stated your exception to that.

Mr. Mullen: We except to the rejection of clause (e) of Defendants' Instruction J as offered, for the reasons stated in our argument; and we further object to the revised form in which this instruction will be given by the Court.

The Court: And it is understood that you will prepare this?

Mr. Mullen: We will write it up.

Mr. Robertson: If Your Honor please, we think that (f) has to come out altogether, because that is directly opposed to the former rulings of the Court. That is all I have to say on that.

Mr. Allen: I don't believe any argument is necessary. This would be a directed verdict on that instruction.

The Court: Do you gentlemen want to be heard on that? I think it has been discussed.

Mr. Fred G. Pollard: Just very briefly, Your Honor.

On the record over there, the only jobs that they have ever had in Kentucky were the contracts of October 28 and December 15. If they are going to claim that they were doing work out there on the basis of gross profit of \$28,000 a year, that is one thing; but

the work that they had done in the past was not done on cost plus 5% contracts. They can't come along and say, "We would have done this future work on cost plus 5%," and say that their past record establishes an assured earning capacity which they can apply to the future, when the future is on the basis of cost plus 5%.

That is all I have to say about it.

Mr. Allen: It is in conflict, of course, with our instructions on damages which Your Honor has given. If you give that, it would be directly in conflict with the ones you have already given.

The Court: This instruction is refused.

Mr. Fred G. Pollard: We except, Your Honor.

Mr. Mullen: The Defendants except to the ruling of the Court refusing paragraph (f) of Defendants' Instruction J as offered.

Mr. Robertson: If Your Honor please, we think (g) is wrong as written, but that it can be corrected. It says:

"If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damage caused by the wrongful conduct of that defendant, unless you also find from the evidence that the defendants acted in concert to injure the plaintiff."

page 2466 } There is no charge here of any conspiracy.

This case is based on agency. That proposed instruction is contrary to the former rulings of the Court that the United Construction Workers could be the agent, District 50 could be the agent, Hart could be the agent.

Mr. Fred G. Pollard: We are willing to withdraw the clause beginning with "unless."

Mr. Robertson: I don't think that is true. I don't think that cures it. "If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damage caused by the wrongful conduct of that defendant." I think if you would add "or its agents," it would be all right, as far as I can see. I don't know what Mr. Allen thinks.

Mr. Fred G. Pollard: Your Honor, we would except to the instruction not being given as offered, but we would take that language rather than any other emasculation of it.

Mr. Allen: What is that? I didn't hear you.

Mr. Fred G. Pollard: I said we would except to paragraph (g) not being given as offered, but we will take the other, just putting "or agents" after the word "defendant."

Mr. Allen: Let's see how that will read after you put it in. Right after defendant add "or its agent," and you will stop right there?

page 2467 } Mr. Fred G. Pollard: Yes.

Mr. Allen: I don't think that instruction is complete as to either Plaintiff or Defendants, and if they are going to except to its being given that way, it might be error against them, because then it would simply read, "If you find that one or more of the defendants is liable to the plaintiff for damages, the plaintiff is entitled to recover from such defendant only the damages caused by the wrongful conduct of that defendant or its agents." That would be confusing, and would be error both ways. It doesn't correctly state the doctrine of *respondet superior*. If they find against one defendant, then they can find the damages resulting from the wrong committed by that defendant or the agents of that defendant. That would be wrong. That is the way it would be construed, as written.

If there is going to be any instruction along the line of Instruction (g), it should follow completely and be well rounded on the doctrine of *respondet superior*. That is clearly stated in this late Virginia tort case of *Jefferson Standard v. Hedrick*. We, of course, now are dealing with the law of Kentucky. Nevertheless, the law of Kentucky is the same as this. I refer to *Jefferson Standard Insurance Co. v. Hedrick*, 181 Va. 824. There the Court said:

"It is a general doctrine of law that he, the principal, is held liable to third persons in a civil suit for
page 2468 } fraud, deceit, concealments, misrepresentations,
torts, negligences, and other malfeasances or

misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or ratify or participate in or, indeed, know of such misconduct, or even if he forbade the act or disapproved it. In all such cases the rule applies *respondet superior*, and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings either directly with the principal or indirectly with him through the instrumentality of agents."

That was a tort case in which that doctrine was laid down by the Virginia cases, and identically the same doctrine is laid down in the Kentucky cases, many of which have been read here, all of which Mr. Moore has over there in his brief.

If you are going into the question of the liability of the defendants separately, then you have to state properly in

that connection the doctrine of *respondeat superior*. It doesn't do it with that little addition there.

Mr. Robertson: Do you want to be heard on that?

Mr. Moore: No. I think the whole thing ought to come out. I think all of (g) ought to come out.

Mr. Allen: I do, too.

Before I conclude, let me say this, if Your page 2469 } Honor please. We have been dealing with Instruction J here, which contains 7 paragraphs. We have objected to a number of paragraphs, and Your Honor's ruling has been, tentatively at least, that a number of the paragraphs are wrong.

There is no duty upon the Court or upon us to reframe those instructions; and furthermore, we might get into error if we do. If they offer an instruction that is wrong, then I think the proper course to pursue is for Your Honor to refuse it and say, "Gentlemen, you can except to my refusal to give that instruction, you can offer another instruction in accordance with my ruling, and I will give that if I think proper, without requiring you to give up your exception in connection with the other instruction."

We are getting on right dangerous ground when we take an instruction this long and go through it and try to modify their own instruction to conform to Your Honor's views, and then when we get through, they still except to that instruction. We would certainly, I think, out of an abundance of caution, have to ask Your Honor, if they except to it, not to give it, unless it is given under the circumstances that I have mentioned: Let them except to Your Honor's ruling in not giving what they ask for. Then let them offer an instruction which comes within Your Honor's ruling, let them offer it under protest if you wish; but under our procedure they have the right to do that and still rely upon their exception to your refusal to give their instruction as originally offered.

The Court: If the Court refuses this instruction, as I see it, it is up to these gentlemen to offer another instruction.

Mr. Allen: That is right.

The Court: That is the practice in this State.

Mr. Robertson: Unless we proceed that way, we are not going to finish today.

The Court: You don't have to offer any further instruction, but by offering a further instruction you do not waive your objection and exception to the instruction refused. If you do except to an instruction that you offer, you have the privilege of offering a substitute.

Mr. Fred G. Pollard: Yes, sir. We can't very well offer a

substitute unless Your Honor indicates what his ruling will be, what he would permit.

The Court: I have indicated in several instructions what I would permit, but I doubt, then, if you brought an instruction in covering those points, whether or not you could except to it. You have saved your exception by excepting to your original instruction.

Mr. Allen: That is exactly correct.

Mr. Lowden: We have that situation two or three times. That is the thing I asked this morning when Mr. page 2471 } Mullen excepted to not giving one and excepted to the one we put in. You said it was going to be the Court's instruction.

The Court: All of the instructions, finally, are the Court's instructions. When the Court reads the instructions to the jury, they are the Court's instructions.

Mr. Allen: That question has not been so very important until we came to this long instruction with so many objections, several of which were sustained. We object to the whole thing.

The Court: I am inclined, gentlemen, to sustain the objection to (g).

Mr. Moore: In its entirety?

The Court: Yes, as written.

Mr. Mullen: The Defendants except to the ruling of the Court refusing to give paragraph (g) of Defendants' Instruction J as offered.

(Discussion off the record.)

Colonel Harris: Did Your Honor mean, when you said the whole instruction was refused, that is all of the one lettered J, and not merely the paragraph?

The Court: Yes.

(Discussion off the record.)

Colonel Harris: Aren't we departing, if the Court pleases, from the procedure we followed for two days on their instructions?

page 2472 } The Court: Are we?

Colonel Harris: It seems to me that we are; that the procedure we have used for two days on theirs, they now say let's don't use on ours.

Mr. Robertson: I think the way it was modified, we accepted it. That is my recollection.

The Court: I don't think they took any exception.

Mr. Allen: We didn't take any exception to the modification.

Colonel Harris: The point I was making was about putting them in good shape according to the theory of the Court right here and now, the way we did on theirs.

The Court: Haven't we been doing that up to now?

Mr. Fred G. Pollard: Suppose we re-offer this Instruction J as reformed by the suggestion of the Court.

The Court: Then the Court will grant the instruction.

Mr. Mullen: We will do it without waiving our exception.

The Court: Without waiving your exception to the original instruction.

Mr. Fred G. Pollard: All that remains to be done is for us to have it retyped.

The Court: Yes.

Mr. Allen: When we accepted the modification page 2473 $\frac{1}{2}$ tions that he made, then we arranged it right

there and rewrote it according to that modification, but you are not accepting the modifications here to this instruction, but you want what he does agree to give and save your point as to this. In that event, he has to refuse the entire instruction and you write it over.

Mr. Mullen: Let's get this on the record. Your Honor, you rule that you refuse Instruction J as offered.

The Court: As offered.

Mr. Mullen: And we except to the ruling of the Court for the reasons heretofore stated.

(Defendants' requested Instruction K follows:)

"The jury is instructed that:

"The mere expectancy of a contract is not sufficient to justify recovery of alleged loss of profits therefrom. The plaintiff claims damages in the amount of \$27,125.00 representing the loss of gross profits in connection with approximately \$542,500.00 worth of work on a basis of cost plus a fee of 5% which the plaintiff claims Pond Creek Pocahontas Company had agreed to have the plaintiff perform. If you find that the defendants committed the acts complained of, and you further find that the plaintiff did not have an enforceable contract for this work, you cannot consider it as an item of damages.

"If you believe that the work which the plaintiff claims would have been awarded to it has not been done page 2474 $\frac{1}{2}$ or any part thereof has not been done, then you may not award damages with respect to any of such work which has not been done.

"If you believe that any part of this work was let on bids, and if you further believe the plaintiff would have been awarded this work if it had bid on it and been the low bidder, then the plaintiff is not entitled to recover any damages for this item."

Mr. Robertson: Now we go to K:

"The jury is instructed that:

"The mere expectancy of a contract is not sufficient to justify recovery of alleged loss of profits therefrom. The plaintiff claims damages in the amount of \$27,125.00 representing the loss of gross profits in connection—" it isn't confined to just the profits—"in connection with approximately \$542,500.00 worth of work on a basis of cost plus a fee of 5% which the plaintiff claims Pond Creek Pocahontas Company had agreed to have the plaintiff perform. If you find that the defendants committed the acts complained of, and you further find that the plaintiff did not have an enforceable contract for this work, you cannot consider it as an item of damages."

I will discuss that for a moment. Our Court has held repeatedly that you ought not to pick out these items of dollars and talk about them. The Court has ruled here in this case repeatedly that the evidence is within the scope page 2475 } of Virginia decisions which will permit future profits if the jury chooses to award them. There is enough evidence here for that, and that whole statement would be contrary to that ruling of the Court. It is not the law that you have to have an enforceable contract. It is the likelihood that the same old customers will come to the same old stand.

"If you believe that the work which the plaintiff claims would have been awarded to it has not been done or any part thereof has not been done, then you may not award damages with respect to any of such work which has not been done."

That is not the law at all. The Island Creek empire, when it found it could not do work with Laburnum, elected for the time being not to do any work at all, for a time, with anybody. That is no proof he wouldn't have done it with us. Salvati said he would like to go ahead, that it had been authorized, that they had a master plan that would have continued indefinitely over a period of years.

In the final paragraph:

"If you believe that any part of this work was let on bids, and if you further believe the plaintiff would have been awarded this work if it had bid on it and been the low bidder, then the plaintiff is not entitled to recover any damages for this item."

That man Cundiff that they brought in here page 2476 } from Indiana, when they couldn't get Laburnum they might well have taken him for part of it, for a little, meager portion of it, or anybody else they wanted. The fact that they let it to somebody else on bid when they would have let it to Laburnum in conformity with Salvati's original contract, has nothing to do with the situation here.

I think the whole instruction is so wrong that it cannot be recast.

Mr. Allen: I may say this: They are talking about contracts. The principle is exactly the same principle that was involved in the case of *Fenson v. Rabb*. Fenson was engaged in what we call a manufacturer's business. He had contracts with about nine manufacturers. Those contracts were cancelable every year. They ran out automatically every year, and they had to be renewed every year. Rabb bought that business from Fenson on Fenson's statements that he was in good standing with those companies. We claimed in that case damages because we did not get the contracts from two of those manufacturers. When Rabb got hold of the business he discovered that Fenson's standing with those two was such that they didn't see fit to renew the contracts after Rabb got hold of the business.

The question arose in the case as to whether, in view of the fact that the contracts were annual and the company was under no obligation whatsoever to renew the con- page 2477 } tracts at the end of any year, regardless of whether the man was in good standing or whether he was in good standing, we were entitled to damages.

The Court said if it had been the custom or the practice to renew those contracts from year to year as long as the man was in good standing, that that was an item of our damages; that our damages could be figured by the loss of those two contracts.

That case was decided here last June in Virginia. It is *Fenson v. Rabb*. Mr. Sands was on the other side, and he thought that was crazy law. I thought he would go crazy about it. He said it was the most farfetched thing he ever

heard of, but that is what the Court of Appeals said. And when the case came back for trial, all we had to do was to show what our damages were from the loss of those two contracts which they were under no obligation whatsoever to give us, but according to the evidence, if Fenson had been in good standing the probability was that we would have gotten them. They said we could go to the jury on that.

Mr. Fred G. Pollard: Are you all through?

Mr. Allen: Yes.

Mr. Mullen: That case you just cited was a case of fraud and failure of consideration, and the basis of your damage was against a man who fraudulently represented what he had and who got compensation for something that he
page 2478 } didn't turn over. I don't think that applies at all.

Mr. Allen: You all finish, and then I will reply.

Mr. Fred G. Pollard: Judge, the plaintiff in this case claims he had this work that Mr. Salvati agreed to have him perform. The jury has a right to determine from the evidence whether or not he actually had that contract.

Mr. Mullen asked Mr. Bryan, "Was that a 5 per cent binding contract?" And the witness, Mr. Bryan, said, "Well, Mr. Mullen, if what you mean is whether I could have sued on it, the answer is no."

Any time anybody has a contract he can't sue on, he ain't got a whisper. That is a question for the jury to determine.

We are certainly entitled to an instruction that if they believe he didn't have that contract, they can't award damages for it.

The second paragraph: I just don't see how in the world anybody can allow damages that he would have earned if something had been built which has never been built, and the jury is certainly entitled to make a decision that if they believe something has never been built, of course he is not entitled to any fee he would have earned on something that hasn't been done. If I undertake to get you a divorce and you never get a divorce, I certainly am not entitled to the fee I would have gotten if you had gotten the divorce.

page 2479 } The last paragraph: Salvati testified—and there is no contradiction of it anywhere in the evidence—that if Laburnum had bid and bid low, it would have been awarded the work. Mr. Robertson has referred to the contract that Cundiff got. Mr. Bryan bid on that. Mr. Cundiff's bid was \$111,000. Mr. Bryan's bid was \$205,000. You just can't blame Mr. Salvati for not giving him the contract on that when Cundiff was \$95,000 low. The jury has the

right to decide from the facts whether or not Bryan would have been given the contract if he had been low. Salvati said he would have. The jury has the right to pass on whether they believe Mr. Salvati.

There is nothing in there that isn't a proper jury question. It puts it squarely up to the jury.

There is one thing I would like to change, and that is in about the sixth line. It says the Pond Creek Pocahontas Company. Plaintiff's Exhibit on Damages says Mr. Salvati. So I would like to substitute "Mr. Salvati" for "Pond Creek Pocahontas Company." They made an exhibit of this item as an item of damages, Exhibit 33.

The Court: Do you want to change that in your own handwriting, Mr. Pollard?

(Instruction handed to Mr. Pollard.)

The Court: You are offering it as changed?

Mr. Fred G. Pollard: Yes, sir

page 2480 } Mr. Lowden: "Mr. Salvati"?

Mr. Fred G. Pollard: "Mr. Salvati." That is what your Exhibit 33 says.

Mr. Allen: Are you all through?

Mr. Pollard: Yes, sir.

Mr. Allen: If Your Honor please, Mr. Bryan testified, and Mr. Salvati corroborated, Mr. Bryan stated unequivocally that Mr. Salvati agreed to give him this work following the other. Even though it wasn't in writing, an oral agreement to build a house or to put up buildings is perfectly valid. The Court of Appeals held that in the case of this old man out here in Chesterfield, *Horner v. somebody*. In that case Horner agreed to build a house. There wasn't a scrap of ink about it. He agreed to built it, and he didn't build it, and they sued him for damages for breach of the oral contract to build that house. I was in the case, and I defended the case on the ground that the building of the house involved also a contract to sell the lot. Consequently, the building of the house would enter into the lot, and therefore it was real estate, and the contract wasn't valid because it was not in writing.

The Court of Appeals differed with me, and I lost the case. They held—

Mr. Robertson: That is the first one I ever heard of, George.

page 2481 } Mr. Allen: The Court of Appeals held that that was a perfectly valid oral contract to build

that house, and that this boy was entitled to the difference between the price at which Horner agreed to build the house, and the price which he later would have had to pay to get the house built.

Mr. Bryan testified that Salvati agreed to give him this work. I say it was an enforceable oral agreement. He has "contract" in here, and that would be misleading.

In addition to that, the instruction is wrong down here in the second paragraph.

The Court: Let me ask you this: How do you get around Mr. Bryan's statement that he said he couldn't enforce the contract?

Mr. Robertson: Here is the way I answer that, Judge. This is against every ruling the Court has made here on prospective profits.

Mr. Allen: Mr. Bryan's answer to that question was nothing on earth but a matter of opinion on the law. That is all that is, opinion on the law, and it has nothing to do with the case. We are dealing with questions of fact. Do you accept Mr. Bryan's statement which he made in our testimony that you are liable and that so-and-so is agent? He positively testified that different persons were agents of so-and-so.

Mr. Mullen: We were asking him for a fact page 2482 } here, if he had an enforceable contract, not if he had a contract he could sue on.

Mr. Allen: When you asked him that, you were certainly asking him a question of law.

Mr. Fred G. Pollard: It was an admission against his interest.

Mr. Allen: That is contrary to the theory and the principle of all the instructions on damages that Your Honor has given. Your Honor has given, so far, complete, well rounded instructions on damages, limiting us to profits that can be proven with reasonable certainty. That element is involved in this instruction. All of the elements essential for us to prove in order to recover are dealt with in our instructions, and this instruction is in conflict with those principles.

Answering Mr. Mullen with reference to the *Fenson v. Rabb* case, Mr. Mullen said that was a case of fraud. Not only was it not a case of fraud, it was in fact a case of contract. The action was on an implied contract, and there was a distinct avowal that no fraud was charged and no fraud claimed.

Mr. Mullen: Did you claim failure of consideration?

Mr. Allen: No, the claim was based upon the fact that Fenson had innocently represented that he was in good standing, and as an incident of that good standing we would get

the benefit of those contracts. It turned out he
page 2483 } was not in good standing, and we claimed the fact
that he was not in good standing was the cause
of our not getting those two contracts. The Court said that
we could prove it.

We settled the case afterwards. We got together on what
profits we would have made under those two contracts and
settled the case when it came back.

That is about all I have to say on that. The instruction is
right in the teeth of the other damage instruction.

The Court: Gentlemen, I will refuse this instruction. All
this may be argued to the jury.

Mr. Fred G. Pollard: We except to Your Honor's ruling.

Mr. Mullen: We except to the Court's ruling refusing to
grant Defendants' Instruction K, for the reasons heretofore
stated.

Mr. Robertson: If Your Honor please, we are coming to
three or four in a row that are just different phases of the
same thing. Now we come to L:

"The jury is instructed that:

"The plaintiff claims damage in the amount of \$120,000.00
by reason of the alleged destruction of the business relation-
ship which it had formed with Pond Creek Pocahontas Coal
Company, Island Creek Coal Company, and their associate
and subsidiary companies, but the plaintiff has
page 2484 } introduced no evidence of the alleged destruction
of this business relationship and you cannot al-
low any recovery of damage for such destruction."

That was completely argued yesterday, and this is in com-
plete conflict with what the Court has already ruled.

The Court: It is my recollection that we went over this
very carefully yesterday, and unless you gentlemen have
something further to say, I am prepared to rule.

Mr. Mullen: Have you anything to say, Colonel?

Colonel Harris: I think possibly, in view of the fact that
there may be some confusion, it was in objections to some
of their interrogatories yesterday rather than this, that we
ought to state the grounds of our exception. Otherwise, I
am afraid we haven't got one under the agreements that have
been made heretofore.

Mr. Mullen: All right, go ahead and state them.

Colonel Harris: We object to the refusal of this instruc-
tion.

The Court: I suspect I had better say, first, that the Court refuses Instruction L.

(Discussion off the record.)

The Court: Go ahead, Colonel.

Colonel Harris: If it is permitted, we except for all the grounds that were stated in our objections to a similar charge, or a charge dealing with the same thing, that page 2485 } they requested yesterday or the day before, so that I don't run the risk of losing it if I try to state it.

Mr. Allen: That is all right.

The Court: Very well.

Mr. Robertson: Now we come to M:

"The jury is instructed that:

"The plaintiff claims damage in the amount of \$120,000.00 by reason of the alleged destruction of the business relationship which it had formed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies. You cannot allow this item of damages, unless you find as a fact from the evidence that such destruction of the business relationship occurred prior to November 16, 1949, or was caused by the wrongful conduct of one of the defendants which conduct took place prior to that date."

I think we argued all that out yesterday. I remember very distinctly stating that we claim that this business relationship was destroyed when we were run off the job on July 26, and that everything subsequent to that is mere proof of the prior termination of the business relationship. We had that up and down yesterday.

Mr. Fred G. Pollard: Is that all you have to say on that?

Mr. Allen: That is all we have at the present time.

Mr. Fred G. Pollard: Your Honor, we have page 2486 } an entirely different situation here. This instruction covers the position just taken by Mr. Robertson, that is, in the last clause where it says, referring to such destruction, "was caused by the wrongful conduct of one of the defendants which conduct took place prior to that date."

The purpose of this instruction is that we believe, from the evidence before the jury, the alleged destruction of the business relationship, if it was caused by us, was not caused by us until after the suit was brought. We think the jury has a

right to pass on them it occurred. All that this instruction says is that you cannot allow this item of damages unless you believe that the destruction occurred prior to November 16, or occurred or was caused by the wrongful conduct of one of the parties and the conduct took place prior to that date. I don't see anything in the world wrong with that. If it was caused by acts which took place after the suit was brought, it is not properly a part of this cause of action.

We objected at the time that evidence was allowed on it, and I believe Your Honor said, "Can't that be taken care of by an instruction?"

The Court: Do you gentlemen want to say anything further?

Mr. Allen: If Your Honor please, this Instruction M, as well as L, is objectionable because it singles out the evidence, which the Court repeatedly said should not be done.

Your Honor will remember, too, that this matter was discussed yesterday or the day before. I forget which it was. The matter was all gone over.

We claim that what they did on the 26th of July, 1949, destroyed our business relationship, if it was destroyed at all, and that is no evidence to show or upon which to base an instruction that it was destroyed after that time. What took place afterward was nothing on earth but an aftermath or natural consequence of what happened on the 26th. There is no evidence that these defendants did anything to destroy the business relationship after that time. What was done was done on July 26.

Mr. Fred G. Pollard: Your Honor, I don't want to interrupt Mr. Allen, but he has made a palpable misstatement of the evidence.

The Court: If he has, I will let you reply to it. Go ahead.

Mr. Robertson: I was going to say, Your Honor, that they claim that they never did anything to us that was wrong. They claim they didn't run us off the job. They claim that everything that Hart did was peaceful, lawful, and proper. We say on that particular date, the 26th, you ran us off the job. They said, "You can't buck the union and get away with it. Out you go," and out we went. We have never been back there to do any work since, and it destroyed our relationship when they did that.

I speak subject to correction, but my recollection is that when we offered this evidence on the period subsequent to July 26, and it ran on down to the time the suit was instituted, I stated to Your Honor then that that was merely in proof

of the fact that our business relationship had been destroyed, and that no matter how we tried to get business after July 26, we never got a dollar's worth.

As I have understood from Your Honor, taking care of it under the instructions and the argument, they have a perfect right, under the instructions given here, to go in there and, in addition to all their argument that everything else was lawful on July 26, they can say, "Yes, and they are trying to flimflam us now, because do you believe it was destroyed on that date as they claim, when they were here bidding and writing and trying to get it ever since, after that?" It is jury argument, just pure and simple.

Mr. Fred G. Pollard: May I answer Mr. Allen's statement?

The Court: Yes.

Mr. Fred G. Pollard: First, I might say that this instruction doesn't conflict with what Mr. Robertson has just argued.

The jury can find on that very easily.

page 2489 } Mr. Allen said there was no evidence that the relationship was destroyed after the suit was commenced. We went fully into what happened from May 15 to May 18, 1950. That is when it was destroyed. There is a whole lot of evidence on it.

The Court: They claim it was destroyed before then.

Mr. Fred G. Pollard: Yes.

The Court: This instruction says, "You cannot allow this item of damages, unless you find as a fact from the evidence that such destruction of the business relationship occurred prior to November 16, 1949," which was, incidentally, the date the suit was instituted, "or was caused by the wrongful conduct of one of the defendants which conduct took place prior to that date."

Mr. Fred G. Pollard: That is correct, sir.

The Court: In other words, the wrongful act must have taken place prior to the date of institution of suit.

Mr. Fred G. Pollard: That is correct, sir.

The Court: Gentlemen, it strikes me—

Mr. Robertson: Before you rule there, let me ask you this. I am going to ask that you delete the \$120,000.00. Just say, "The plaintiff claims damage by reason—"

Mr. Fred G. Pollard: Your Honor, Mr. Bryan has testified that that was one of his items of damage.

Mr. Robertson: And it is in the cardboard page 2490 } exhibit that you put in, but that doesn't make it proper in an instruction, any more than to say not to exceed the amount of \$500,000.

The Court: It may be best to leave that figure out. You can recite it to the jury.

Mr. Mullen: They itemize that as a particular item of loss.

Mr. Fred G. Pollard: He has itemized that.

The Court: What was that citation you gave a few minutes ago, Mr. Allen, on emphasizing figures in the instructions? I think it might be well for you gentlemen to consider that before the Court passes on it.

Mr. Fred G. Pollard: We don't object to cutting out "in the amount of \$120,000.00."

Mr. Moore: May I ask one more question? Don't you think the word "compensatory" ought to come in before "damages," five lines down?

Mr. Fred G. Pollard: No.

The Court: That has been explained in another instruction. We had that question up a little while ago.

"The plaintiff claims damage by reason—" strike out "in the amount of \$120,000.00."

I will grant the instruction.

Mr. Moore: Will you note the Plaintiff's objection and exception to the allowance of Instruction M.
page 2491 }

Mr. Robertson: Now we come to Instruction N:

"The jury is instructed that:

"The plaintiff claims that its reputation has been damaged in the amount of \$100,000.00, but plaintiff has introduced no evidence of any damage to its reputation, and you cannot allow any recovery for damage to reputation."

We argued that yesterday

The Court: I think we argued that pretty thoroughly yesterday, unless you have something further to say.

Mr. Fred G. Pollard: I want to say this: I want to see some authority cited by the Plaintiff that you can allow recovery for damage to reputation when there is no evidence of any damage.

Mr. Robertson: We went into that yesterday and talked about Salvati's evidence.

Mr. Fred G. Pollard: I don't want to get the brush-off that Mr. Robertson is trying to give me. I just want some authority.

The Court: I can hear but one at a time. The Court Reporter cannot take it down, anyway.

Mr. Allen: We started, didn't we?

The Court: Yes.

Mr. Allen: Have we finished? (Laughter.)

Mr. Robertson: I say this, Your Honor—

The Court: One at a time.

page 2492 } Mr. Robertson: I say that we argued that
thing at length yesterday.

The Court: I think you have already said that, Mr. Robertson.

Mr. Robertson: Both on the facts and on the authorities, which we have here and cited to the Court.

Mr. Allen: I say this, that I know that I have one authority here, and Mr. Pollard read it there after I had read from it, and I know Mr. Moore read from another authority supporting us on that instruction, and that argument was in connection with our instruction on the same subject.

The Court: I recall the argument.

Mr. Allen: So I should think that would have to go out.

Mr. Moore: We would like to add, it would be novel if we had to cite authority for the Defendants' instructions.

Mr. Fred G. Pollard: Now it is our turn, Your Honor?

The Court: It is your turn.

Mr. Lowden: Your second turn.

Mr. Fred G. Pollard: The case we cited was in 116 Va., and it said that the instruction was bad because it didn't say that the damages had to be based on evidence. That is our authority. We submit that they haven't submitted any authority, and I just want to be shown it, be-
page 2493 } cause what they showed yesterday did not cover
this instruction.

Mr. Allen: We have authorities here directly in point, saying that action of that kind does affect the man's reputation because it naturally is inherent in it. We argued all that here yesterday at length.

Mr. Mullen: It was pointed out that that sentence you read here didn't say that. The sentence you read from that case yesterday did not say that you didn't have to give evidence of it. It said you didn't need argument then on the question of instructions as to whether reputation or credit could be damaged by what happened there, but you had to show evidence of it.

Mr. Robertson: Yesterday you made exactly the same argument, or Mr. Pollard did, exactly the same argument in almost the identical words, that you are making now.

Mr. Allen: I read from another case, I think *Wilkinson v.*

Allen, which went on to say that there are damages of certain types that are inherent in the nature of the case, and require no proof and need not even be alleged in detail. Mr. Moore read a case on the subject, and His Honor ruled on it.

Mr. Mullen: Haven't you a case on that subject, Colonel? You had one at one time.

Colonel Harris: I looked through. I remember you said it was at the bottom of a yellow page. I went page 2494 } through and didn't find it on the yellow sheets. It is one of my sheets that probably has been lost.

Mr. Fred G. Pollard: May I read this one paragraph from *Norfolk & Southern Railway Co. v. Tandierson*, 116 Va. 153. The Court said:

"It would have been better to have told the jury that future damages, like all other damages allowed, must be ascertained from the evidence before them, but when the instruction as a whole is considered we do not think that the jury could have thought they had a right to fix future damages by mere conjecture instead of by the evidence before them."

This case says they have to do it by the evidence before them. In this case the plaintiff admits that there is no evidence.

Mr. Robertson: Wait a minute.

The Court: Let him finish.

Mr. Fred G. Pollard: It is the law that there has to be evidence. " * * * we do not think that the jury could have thought they had a right to fix future damages by mere conjecture instead of by the evidence before them."

The plaintiff admits there is no evidence on this point, and this is the law, and this instruction must be given unless they can produce some authority which says you don't have to produce evidence to prove damage to reputation.

Mr. Moore: Judge, it seems obvious from the page 2495 } quote that they were talking about future profits.

They said so four times in the quote. Future profits can't be allowed on the basis of conjecture. Of course they can't. We are talking about damage to reputation.

Mr. Fred G. Pollard: Damage to reputation on conjecture.

Mr. Robertson: They are talking about no damage to reputation? What about the testimony of Salvati? We went into that yesterday, that it was ruined throughout the coal fields of West Virginia and Kentucky.

The Court: I refuse the instruction, gentlemen.

Mr. Mullen: The Defendants except to the refusal of the Court to grant Defendants' Instruction N tendered to the Court.

The Court: Are you through, Mr. Mullen?

All right, Mr. Robertson.

Mr. Robertson: We think Defendants' Instruction O is fatally wrong and cannot be recast

"The jury is instructed that:

"There is no evidence in this case that any of the defendants have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, and therefore you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall page 2496 } be limited to compensatory damages only."

I don't think I care to argue that, that is so palpably in conflict with all former rulings.

The Court: I will hear from the defendants on that.

Colonel Harris: The language in that is taken from a case, if the Court pleases, a Kentucky case. The case is *Louisville & Nashville Railroad Co. v. Wilkins' Guardian*, 136 S. W. 1023. The Court said:

"From these repeated adjudications the rule would seem to be firmly established in this jurisdiction that punitive damages are recoverable only where the defendant has acted wantonly, or recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations.

"The facts of this case do not bring it within the rule, and for that reason alone the judgment is reversed, and a new trial ordered."

Those first four lines were taken from that, and that was dealing with punitive damages. That is the express language of the Kentucky Court. The case was reversed because they allowed punitive damages without meeting that test.

Mr. Lowden: This one says there isn't any evidence in this case.

Mr. Robertson: Are you through?

The Court: This instruction tells the jury page 2497 } there is no evidence in the case that they have acted wantonly, recklessly, or oppressively, or

with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations. Isn't this a question for the jury to determine?

Mr. Allen: That is what you have decided in giving our instruction.

Colonel Harris: Mr. Pollard says that is covered in a later charge, and we will defer changing that, if the Court pleases.

The Court: Pass by it?

Colonel Harris: If it is agreeable to Your Honor.

Mr. Owens: It isn't covered there.

Mr. Lowden: I don't recall it anywhere else.

Colonel Harris: Which one did you think covered it, Fred?

Mr. Fred G. Pollard: I don't think that it is covered.

Mr. Lowden: Judge, our ideas might be different if this was merely an instruction as to what malice is, or something like that, but that is not what this does.

The Court: This tells them they can't find punitive damages in the case.

Mr. Moore: Unless the facts of this case are like the facts of that Kentucky case Colonel Harris read.

The Court: Have you gentlemen any objection to the definition?

Mr. Allen: It should be compared with ours here. Of course, if that is the correct definition, you would say the jury cannot find punitive damages unless they believe from the evidence that they acted, and so forth and so on, provided that is a correct definition. I will compare it with ours.

Mr. Lowden: Let's compare it with this case they are talking about.

The Court: Mr. Robertson, we get the point.

All counsel ought to cooperate with the Court and see if we can get the instruction as near right as possible. If we keep going back, we will never get to the jury. We can thresh out a lot of these matters around the table here.

Colonel Harris: Here is a suggested change in Defendants' Instruction O: Instead of saying "There is no," strike that out, and in place of it write "If you believe from the". For the first three words substitute, "If you believe from the evidence in this case that" and strike out "any" and put "none", and then on the third line from the bottom strike out "and therefore." As modified, we do not tell them there is no evidence at all. We leave that still a question for the jury.

The Court: Then it will read.

"If you believe from the evidence in this case page 2499 } that none of the defendants have acted—"

Mr. Robertson: May I interrupt you? "or any of their agents acting within the scope of their authority."

The Court: "—or any of their agents acting within the scope of their authority." I understand, Colonel Harris, you don't agree to that. I am just making a pencil memorandum of it.

Colonel Harris: No, sir, we don't agree to that.

The Court: "—have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only."

Colonel Harris: What was that addition he made?

The Court: After "defendants" in the first line, "or any of their agents acting within the scope of their authority."

Mr. Allen: You ought to add to that, also, if you are going to put that in there, "in the performance of a duty to their principals to organize."

Mr. Robertson: I think I ought to say this, in fairness to the Court, Your Honor. I still think it is wrong from the viewpoint of the defendants, because the way it is done there,

it is still all wrong, because they set me right page 2500 } on one earlier today. If any one defendant did

anything wrong through its agent, within the scope of his authority, we hook them all, on that instruction, as I understand it. That is certainly opposed to their theory of the case. I think in fairness to the Court, unless I am wool-gathering, that is what the instruction would now mean. So it is still wrong. It is wrong in our favor. I don't want it wrong in our favor.

Mr. Allen: We have protected ourselves against that in our instruction, the last paragraph of it, on that subject.

Mr. Robertson: I want to cooperate, too, but I don't want to get myself out here and invite a reversible error in trying to cooperate.

Mr. Allen: It is a difficult instruction to write, if Your Honor please, changed around like this. We were very careful to try to protect ourselves against any possible error in the instruction as we offered it along that line, and we coupled it with language like this: "If you believe from the evidence that the actions complained of were committed by Hart—"

Mr. Fred G. Pollard: What number is that?

Mr. Allen: That is No. 10.

“—by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized, and if in doing any acts which he was authorized to do he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done and did not expressly ratify the manner in which the acts were done.”

If you give this as they have suggested here, unless you give it as an instruction requested by them to which they do not except—and they are not willing, I understand, to assume that burden—I would be afraid of it, because when you hold principals liable for wanton and reckless acts of an agent you have to have the instruction coupled with a lot of elements that they haven't indicated they are going to put in that one.

Mr. Robertson: If the agent of any one did wrong, acting within the scope of his authority, you would hook all three, unless you had other facts added to it.

Mr. Allen: And that would be wrong.

Mr. Lowden: The thing that has been troubling me all day is that we should rewrite their instruction and offer it. That leaves us away out in the field, and we may get in trouble.

Mr. Robertson: It is inviting error. I don't think we have any so far, so far as I know.

Mr. Lowden: We could indicate what would be all right with us on a redraft, but we certainly couldn't leave ourselves in the position of rewriting their instruction and offering it in our behalf, if there is something wrong in it.

The Court: You are not offering it in your behalf. It is just a suggestion. I think counsel on both sides have made suggestions.

Mr. Allen: Yes.

The Court: And they have not been bound by them.

Mr. Lowden: When we were going through ours yesterday, we always accepted the thing and rewrote it and brought it back the next day.

Mr. Allen: And took no exception to it.

Mr. Lowden: But these gentlemen are doing different from us.

Mr. Fred G. Pollard: Your Honor, I understand that you have refused the Defendants' Instruction O.

The Court: I haven't passed on it yet.

Mr. Fred G. Pollard: As offered, I mean.

The Court: I haven't ruled, at the moment.

Mr. Fred G. Pollard: We want to offer it as written, without any attempt to conform it.

Mr. Allen: You mean as a direct instruction, "There is no evidence * * *?"

Mr. Mullen: We want to offer it exactly as written.

The Court: All right. The Court will refuse that instruction.

page 2503 } Mr. Fred G. Pollard: We except.

Mr. Mullen: Defendants except to the ruling of the Court refusing Defendants' Instruction O as tendered.

Mr. Robertson: Judge, I think Defendants' Instruction P can be modified to be correct, very easily, by adding a phrase in it.

The Court: Let me read it.

(Defendants' requested Instruction P follows:)

"The jury is instructed that:

"If W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages can be awarded plaintiff against any of the defendants."

Mr. Robertson: "The jury is instructed that:

"If W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff"—I have added in there, "or compelling the employees of the plaintiff to join one of the defendant unions"—"then no exemplary or punitive damages can be awarded plaintiff against any of the defendants."

Colonel Harris: No. This plaintiff is not suing on account of any injury to any employee.

page 2504 } Mr. Robertson: I withdraw it, and let it go as is.

Mr. Mullen: Is it granted?

The Court: Granted.

Mr. Robertson: Q, I think, is wrong:

"The jury is instructed that:

"Any wanton, reckless or oppressive conduct of Hart or

any person with him on the occasions complained of cannot be imputed to any of the defendants so as to authorize the award of any punitive damages against any of the defendants in the event you find for the plaintiff."

Your Honor has ruled on that over and over again.

Mr. Allen: That comes right back to the question that the Court has the right to direct a verdict on the question of punitive damages, regardless of the circumstances shown by the evidence.

Mr. Moore: We believe that is the same thing we were talking about yesterday, that ratification and authorization are not necessary in Kentucky to make the principal liable in punitive damages for acts of the agent within the scope of his employment.

Colonel Harris: We argued that point yesterday, and the difference that was stressed, as I recall, in Mr. Pollard's argument, was that these defendants are voluntary associations, and they are not corporations, and that the law of agency as to voluntary associations is correctly page 2505 } stated there. There is no liability on them for punitive damages on account of any act of an agent unless the other requirements that were argued yesterday were included.

Mr. Allen: Do you all have anything further?

Mr. Moore: Would you like me to give one quote from the Nagel case in Kentucky, which we talked about yesterday? This is quoting the language of the Court:

"Appellant contends, further, that exemplary damages should not be awarded against a corporation for the acts of its servants, unless it expressly authorized the act as it was performed, or afterwards ratified it, or was negligent in employing its servant, or in retaining him in its employ; and for this he quotes Mr. Sedgwick on Damages. True, the learned author says such rule obtains in many jurisdictions. Fortunately, it has never obtained in Kentucky, and we are not now so impressed with its soundness or authority as to undertake to ingraft it on our jurisprudence. Of little value to the injured and outraged passenger would all other declarations of law be if this rule obtained as stated. The later and better rule seems to be that corporations are liable for the acts of their servants committed within the scope of their employment * * *."

The Jackson case says they are treated as corporations.

Mr. Allen: The Kentucky case says under the page 2506 } Kentucky Constitution and the Kentucky statutes, these associations are dealt with and treated as corporations. They said that in the Ashley case 291 S. W. 21. "The word 'corporation' as used in this Constitution shall embrace joint stock companies and associations."

The Court: The Court will refuse Instruction Q.

Mr. Mullen: The Defendants except to the ruling of the Court in refusing Defendants' Instruction Q as tendered, for the reasons stated in the argument here today and for the reasons stated in argument of the like question on an instruction offered by the Plaintiff.

(Defendants' requested Instruction R follows:)

"The jury is instructed that:

"None of the defendants is legally responsible or liable to plaintiff for any fears of any of its employees which were generated by the alleged reputation for violence of Breathitt County, Kentucky."

Mr. Robertson: Defendants' Instruction R. If Your Honor pleases, I think if they changed one word in that, R would be all right.

"The jury is instructed that:

"None of the defendants is legally responsible or liable to plaintiff for any fears of any of its employees which were generated by the alleged reputation for violence of Breathitt County, alone."

page 2507 } Mr. Allen: " * * * generated solely by the alleged reputation for violence * * * "

The Court: You suggest "solely" after "generated." Is there any objection to that change, gentlemen?

Mr. Fred G. Pollard: Yes.

The Court: Do you gentlemen want to say anything further at this time?

All right, Mr. Pollard.

Mr. Fred G. Pollard: We just object to it. There is nothing wrong with it the way it is. All it says is that the defendants are not responsible for any fears that plaintiff's employees may have had which were generated by the alleged reputation of Breathitt County. I don't think there is any necessity to put "solely" in there, and we object to it.

The Court: Do you want to say anything further?

Mr. Allen: I think to make the instruction fair, it certainly ought to be in there.

Mr. Robertson: I can give you an illustration of it. When I went out there and got to Salyersville, I was very anxious to take a picture of the Court House, because I was thinking it would be a very interesting thing to have, but I didn't tarry long enough. I thought I had better be moving. Then when I went down there to the tippie site, I didn't tarry around there very long. If that is the only thing, then they couldn't recover from that. But if, in addition
page 2508 } to that, somebody shows up and tells me to get the hell out of there, then I could recover. I am just using a garden variety illustration.

Mr. Allen: When you inquire back, "What does 'Get the hell out of here' mean?" in view of the reputation of Breathitt County, it means "Get the hell out of here, or we'll kick your butt out."

Mr. Robertson: Who was it said there would be some butt-kicking?

Mr. Allen: Hart himself said there might be some butt-kicking.

Mr. Robertson: Yes. He said he was going to bring 500 men from Breathitt County, and I don't think he ever committed himself—

The Court: Don't leave out Beaver Creek.

Mr. Robertson: But he didn't say how many butts the 500 men from Beaver Creek would kick.

Mr. Moore: That was just south of Whippoorwill Hollow.

The Court: I think I will give you this as it is written.

Mr. Allen: Without the word "solely" in there?

Mr. Moore: Plaintiff will except to the granting of Instruction R.

Mr. Allen: This instruction reads, if Your page 2509 } Honor please, talking about Instruction S:

"The jury is instructed that:

"Any evidence introduced on behalf of plaintiff to the effect that any of the defendants has a bad reputation for failing to abide by the law in Eastern Kentucky is not to be considered as evidence that the defendants committed the specific wrongful acts alleged by the plaintiff."

In the first place, the instruction is entirely misleading. It may be confused by the jury to apply to evidence about the defendants committing criminal acts of violence that have

nothing to do with this case. We are talking about in this case the reputation of the defendants for running people off the job; in other words, the reputation that Dixon said the defendants had. It was their policy to run the workmen of contractors off the jobs unless those contractors agreed to recognize one of these defendant unions. We are talking about that reputation.

Questions were asked with reference to reputation. They were asked with reference to policy. They were asked with reference to the plan or pattern of these defendants in connection with their conduct in Eastern Kentucky. It all goes back to the evidence of specific instances which tend to show the mind or motive or intention or purpose with which these people went there to Breathitt County on the 26th day of July.

page 2510 } We argued all that out here, and cited the authorities to show that all that evidence was admissible.

This instruction is designed to rule out of the case every bit of that. It will afford the basis for argument on that.

The Court: Is there anything further you gentlemen wish to say?

Mr. Robert N. Pollard: If Your Honor please, this instruction is not directed at any evidence which the plaintiffs put in on specific acts that relate to a course of conduct. It is related only to reputation evidence that they have put in. Where a man says on the stand that he knows the reputation of the defendants for failing to abide by the law in Eastern Kentucky, and he makes no specific reference to any particular job, and says that he knows of his knowledge that the defendant ran somebody off the job at Wheelwright, and names the specific job, that is reputation evidence. He knows the reputation of the defendants. That is what he testifies. He knows their reputation in Eastern Kentucky for failing to abide by the law. They have introduced evidence on that score.

We submit that the rule in Virginia is that in a civil case, reputation or character evidence is not a proper consideration in determining whether the specific acts complained of were committed. I think that rule is stated in page 2511 } 116 Va. 942, the case of *National Union Fire Insurance Co. v. Burkholder*. At page 945, the Court states this to be the general rule:

"The general rule is that in a civil action the character of neither party thereto, nor of any other person, is involved and cannot be made the subject of inquiry."

Character is reputation, what people in the vicinity think of the party or the person as to whom the evidence was introduced. The Court said:

"The record furnishes no suggestion why this case should be taken from under the operation of the general rule mentioned."

It is the general rule in Virginia that reputation evidence is not a proper subject of inquiry in a civil case. That is just what you have here. The rule in other jurisdictions is that if you do have a wilful tort, where you have to prove a malicious act, it may be proper to show bad reputation in the first instance. That is not the rule in Virginia as announced in this case. This was a suit to recover on a fire insurance policy, and there was an allegation by the insurance company that the building was wilfully burned. The wife was the owner of the building. They sought to introduce evidence of the dishonesty of her husband, although he wasn't a party to the action, and the Court held, as I stated, that:

"We are further of opinion that there was no
page 2512 } error in the court's refusal to permit Dr. Miller
to testify as to the honesty of J. C. Burkholder,
the husband of the plaintiff. His honesty was not an issue,
and was in no way involved in this case."

Then the Court stated the general rule.

That is what we have here. We are not referring, Your Honor, to evidence of prior course of dealings on the part of the defendants, but independent evidence of persons who had no specific knowledge or did not know of their own knowledge that the defendants had allegedly run people off the job, but just the reputation that the defendants had for running people off the job. That is what reputation is: what other people think about you. And they have introduced evidence that that reputation of the defendants was bad. Under the rule in this case, we claim it is not proper.

Mr. Allen: If Your Honor please, if they agree that the instruction should not have the broad scope that I indicated I thought it might cover and permit them to argue, we might withdraw our objection. As I understand it, the instruction is not intended to apply to the course of conduct or to the particular instances which might be used to show the state of mind and the motive for which these people went there, and it is only applicable to a situation whereby the reputation

of being a law violator cannot be used as evidence to show that the defendants committed a particular wrong.

The Court: On July 26, 1949.

page 2513 } Mr. Allen: If that is the limitation to be put upon the instruction, I don't think it is objectionable.

Mr. Robertson: Put that date in there.

The Court: That is what you intend this instruction for, isn't it, Mr. Pollard, that is cannot be used in connection with the particular instance on July 26, 1949? Do I understand you correctly?

Mr. Robert N. Pollard: That is correct, Your Honor, that the reputation that they have sought to establish, of the defendants—

The Court: —is not evidence that they committed these acts on July 26. I think you are right about that.

Mr. Robertson: All you have to do is add those two words, "on July 26, 1949."

Mr. Fred G. Pollard: Where do you want to add that, Mr. Robertson?

Mr. Allen: Just "committed the specific wrongful acts complained of."

The Court: " * * * wrongful acts alleged by the plaintiff." I will give this instruction.

(Brief recess.)

Colonel Harris: Are we ready to proceed?

Mr. Mullen: We haven't taken up the last one yet.

Mr. Fred G. Pollard: That involves the same page 2514 } argument that our Instruction F involves.

The Court: That is Instruction T?

Mr. Fred G. Pollard: Before we take those up, Your Honor, Colonel Harris would like to submit a revision of our Instruction O; which you are going to present as O-1, are you not, Colonel?

Colonel Harris: Yes. It will have the changes that I first suggested:

Strike out, in the Instruction O that you have, the words "There is no," and substitute in place of them "If you believe from the," and then strike out "any" and put in "none" in its place; and in the fourth line down, strike out the two words, "and therefore."

I think I told you that a while ago. Is that clear to you gentlemen?

We tender it in that form, if the Court please.

Mr. Allen: Will you read it as it will read, amended?

Colonel Harris: All right.

"The jury is instructed that:

"If you believe from the evidence in this case that none of the defendants have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you
page 2525 } cannot award plaintiff any punitive damages in
this case, and if you should find for the plaintiff,
its recovery shall be limited to compensatory damages only."

Mr. Robertson: If Your Honor please, we object to that, but if they add this, we will not object to it:

"The jury is instructed that:

"If you believe from the evidence in this case that none of the defendants"—then add, "or any of their agents acting within the scope of their authority—"

Mr. Fred G. Pollard: "—or any of their agents acting?"

Colonel Harris: "Nor," didn't you say, n-o-r?

Mr. Robertson: I said "or."

The Court: "—or any of their agents acting within the scope of their authority."

Mr. Lowden: Wouldn't "their respective agents" take care of the trouble?

Mr. Robertson: All right.

The Court: "—of their respective agents."

Repeat that once more.

Mr. Robertson: Do you have it there, Frank?

Mr. Lowden: "If you believe from the evidence in this case that none of the defendants or any of their respective agents acting within the scope of their authority * * *"

Colonel Harris: We can't accept the modification that they suggest, if the Court please, and would like it ruled on without that modification.

The Court: Are you through, Colonel?

Colonel Harris: Yes, sir.

The Court: Go ahead, Mr. Robertson.

Mr. Robertson: If Your Honor please, I am compelled to say just what I said before, that I believe even as modified, either with or without the limiting phrase that we suggested

it is reversible error, for the reasons I stated when we argued here before; and because I want to keep reversible error out of the case, I think we are compelled to object to it.

The Court: As I understand, you don't object to it with this addition?

Mr. Robertson: No, sir.

The Court: The Court will refuse Defendants' Instruction O-1 as offered by counsel for the defendants, but will give O-1 with a further modification to read, after "defendants" on the first line, "or any of their respective agents acting within the scope of their authority."

That means that if you gentlemen desire to present such instruction, the Court will grant it. At the same time, you would be saving your exception on O-1 as originally offered.

Mr. Fred G. Pollard: We except to the page 2517 } Court's ruling in not granting Instruction O-1 as tendered. However, we will now offer it as amended in accordance with the suggestion of the Court and the understanding that it will be granted.

The Court: It will be granted, and you gentlemen may re-write that overnight.

Mr. Moore: What will it be called now?

The Court: That will be numbered O-2, will it not? You have an O and an O-1. This now becomes O-2.

Now we return to Instruction T.

(Defendants' requested Instruction T follows:)

"The jury is instructed that:

"Under the law the defendants had the right to organize or attempt to organize the plaintiff's common laborers and carpenter helpers. If you believe that the plaintiff acted in concert with the American Federation of Labor to interfere with such rights of any of the defendants, then the plaintiff acted unlawfully."

Mr. Robertson: That brings us right back where we were this morning, and I will ask Mr. Lowden to discuss that.

The Court: Let me read this again, please.

Mr. Lowden: You might read F, also.

The Court: That is one that we passed by, did we?

Mr. Lowden: Yes.

The Court: Very well.

page 2518 } Mr. Lowden: As I understand the contentions of the defendant, we are not here concerned with the rights given under the National Labor Relations Act, but we are confining ourselves to the substantive law of the State

of Kentucky. In order to make clear what I am going to say, I think I ought to say something about the National Labor Relations Act by way of illustration.

The National Labor Relations Act is a quite lengthy statute, and it provides for the representation of employees by labor organizations, and it provides that in a case where there is a question as to whether or not particular employees are represented by someone, the National Labor Relations Board may resolve that question. It says that the Board can go in and define the unit, hold an election, certify the representative, and then that representative will be the exclusive representative of the employees in the unit. It sets out certain tests to guide the Board in describing the unit in which they are going to certify the representative.

That Act goes on, and after a representative is certified, and perhaps even in cases where there is no certification, where there is no doubt about the union representing the employees, it provides in Section 8 that the employer commits an unfair labor practice if he refuses to bargain with that representative. The Act provides that the Board, after making such findings, can direct the employer to page 2519 } bargain in good faith. Under the Act as presently written, it prescribes what "bargaining in good faith" is.

The National Labor Relations Act in the form when it was known as the Wagner Act and in the form since it has been part of the Taft-Hartley Act, has been in existence since about 1936, and the number of decisions that have been handed down by the Board would fill pretty nearly a library of books. They are up to Volume 90-something in 16 years.

Many of those decisions involve what is an appropriate unit. A man comes into my plant and says, "I represent all your laborers." If you don't think that is the appropriate unit, you can go to the Board and they will decide whether, in order for him to get exclusive bargaining rights, he must represent all of your employees or a particular craft or a division, or whatever it may be, in the particular case. The cases have always held, if there was a *bona fide* doubt as to whether or not the unit was appropriate, even under that Act where the requirement to bargain is express, if there was a *bona fide* doubt as to what the appropriate unit was, you didn't commit an unfair labor practice in refusing to bargain.

Under that Act, also, if there was a *bona fide* doubt whether or not they represented your employees, you didn't commit an unfair labor practice by refusing to recognize them, be-

cause you had a right to have the thing deter-
 page 2520 { mined in an orderly way where there was a *bona*
fide doubt, even under the Wagner Act.

These people come over to the law of Kentucky, and they are claiming under that law substantially the same rights, or even more than they would get under the Wagner Act. The Kentucky Act doesn't go anywhere near as far as that. It doesn't set up methods for determining the question. It doesn't set up any methods for determining what a unit shall be. It has no express provision that anybody will bargain with anybody. It merely says, in one very short paragraph, that:

"Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing and assemble collectively for peaceful purposes." Then it goes on in the next section:

"Neither employers or their agents nor employees, associations, organizations, or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats, or coercion."

page 2521 { I take it that it is from that section that these gentlemen have written Instructions C. F. and T.

I have run down the cases as to this statute, and I thought it was a really fascinating question as to what that might mean, and I found that there has been no litigation, that I could find, in Kentucky that sheds any light on the subject.

Then I went to all the other States that have laws similar to that, to see if I could find out if a similar statute had been construed in any such way as would bind us here. I found that there was quite a famous case in Wisconsin that construed a statute which I considered to be similar but much more full. I think Mr. Joe Padway brought the case.

In that case the employer had told his employees that if they joined in the union he was going to shut down the plant and move away, and all that sort of thing. They brought an injunction proceeding, and they asked that the defendant be enjoined and restrained from using any threats, intimidating language, and so forth, suggesting the loss of employment,

and requiring its employees, as a condition of employment, to refrain from joining or organizing a labor union.

The Court in that case did grant the injunction in the terms asked for, and they did it on the basis of this statute, which is quite long, but I feel as if I ought to read it.

The Wisconsin statute provided:

page 2522 } "Working people may organize. Injunction
not to restrain certain acts.

"(1) Working people may organize themselves into or carry on labor unions and other associations or organizations for the purpose of aiding their members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, the families of deceased members, or for such other object or objects for which working people may lawfully combine having in view their mutual protection or benefit."

Then in another section of the statute:

"Public policy as to collective bargaining.

"In the interpretation and application of Sections 268.18-268.30, the public policy of this State is declared as follows:

"Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to engage in corporate and other forms of capital control dealing with such employer. The individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. Therefore, it is necessary that the individual workman have full freedom of association and self-organization, designating representatives of his own choosing, to regulate terms and conditions of his employment, and that he shall be free from interference, restraint, or coercion of the employers of labor or their agents in the designation of such representatives or in the self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid and protection."

page 2523 }

The case I am reading from, I think I forgot to cite. It is *Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Co.*, 256 N. W. 56 (1934).

The actual injunction went to the acts of the employer in threatening loss of employment, threatening discharge, and other coercive activities which the bill of complaint stated, and the court held that stated a cause of action and said an injunction might be granted against such activities.

The case does not indicate at all that the court required the employer to bargain with anybody. It merely said "don't interfere." It did contain this language, and I will put this thing out, good or bad, in front of you so you will get the whole picture. The court went on to say:

page 2524 } "Refusing to negotiate with designated representatives or large numbers of employees, the defendant violated the declared public policy of this State, and in that regard there was nothing to mediate or arbitrate. On unlawful act can hardly be the subject of mediation or arbitration."

It goes on to say:

"Had the defendant refused to negotiate with McMurray because he questioned the assertion that he was the designated representative of its employees or large numbers of them, a different question would have arisen. In that case it probably would have been necessary to make every reasonable effort to settle such dispute either by negotiation or via the available machinery of governmental mediation or voluntary arbitration before resorting to court action."

So in the leading case, they come down to say they wouldn't give them any relief, injunctively, if there was any doubt about the matter.

It is to be noted that this case, decided in 1934, didn't order anyone to bargain with anybody, but since that decision, Wisconsin has adopted a statute like the National Labor Relations Act in which it says: "You shall bargain with the designated representative." It has adopted that law.

Now we come along to the Supreme Court of Florida in 1949, in the case of *Miami Laundry Co. v. Local Union 935 International Brotherhood Teamsters, Chauffeurs*, page 2525 } *Helpers and Warehousemen of America, A. F. of L.*, cited in 16 Labor Cases, Paragraph 65.214. Under a similar statute an injunction was sought by the union, and the Florida court dismissed the bill of complaint on the

ground that such statutes did not afford the union any right, that it gave right only to individual employees, and therefore they dismissed the bill because a cause of action wasn't stated.

Then California has a statute that I think is almost word for word the same as the one in Wisconsin that I read to you and they have had some litigation out there about it. There was a case decided, I think in the California Superior Court, I think they call it, Los Angeles County, reported in 2 Labor Cases, Paragraph 18,748, where an A. F. of L. union brought a suit to compel an employer to recognize the union. That court held, reading from it:

"The Legislature has not established any Board in this State with power to conduct hearings, to hold elections, or to make findings of fact such as are provided for in the National Labor Relations Act, the Railway Labor Act, and the Labor Relations Acts of the States in which such statutes have been adopted, nor has it vested such power in the courts. The courts at times have legislated to cure defects or supply manifest omissions in the statutes in order to give effect to the plain intent of the legislative body where, in the absence of such judicial legislation, the statute would be
page 2526 } without efficacy in the accomplishment of its contemplated purpose. In so doing the courts should act with caution and deliberation.

"To hold that the court is vested with the power asserted by plaintiff would not be interstitial legislation by the courts supplying accidental omissions, but it would be necessary for the court to constitute itself in essence a labor board and to formalize its own procedure for bringing the parties before the court, for conducting a hearing in order to ascertain and declare their rights, and for the enforcement of the order of judgment.

"In order to give effect to the section of the California Code which plaintiffs contend should be given, it would be necessary to legislate judicially into the section provisions which the Legislature did not place there or in any other statute, and which it must be assumed, in view of the refusal to adopt the so-called Little Wagner Act, that body did not intend to be a part of the laws of the State."

He dismissed the bill for an injunction.

Then that same judge seesawed back and forth, and he followed it up on other occasions, beating all around the bush. Finally he had a case involving a transportation company in the City of Santa Monica, in which the union this time, the

same plaintiff, represented 62 out of 63 of the
page 2527 } employees, and there wasn't any doubt about it.

He held that they had an obligation to bargain with them. That case was appealed, and the California Appeals Court, 168 Pacific (2d) 741, reversed the judge. They reversed him because it happened that this particular transportation system was publicly owned, and they said the labor laws do not apply to that; and they also went on that as to what the law required anybody else to do, we are not going to say at this time. So the matter in California remained in doubt.

It is my opinion that the Kentucky statute was probably intended to authorize a strike, a peaceful strike, peaceful picketing, peaceful assembly, for the purpose of recognition, because at one time a strike for that purpose was unlawful. I don't know whether it was in Kentucky, but in many States it was. But I do not think that the section prescribed any duty upon the employer to recognize it. I do not think it makes it unlawful for him to decline to do it, and I am especially of the opinion that it does not require him to recognize anybody where there is doubt about it, as there is in this particular case, because the evidence is that the A. F. of L. signed the people up, and by their own testimony that was of their own free will. Then they came along and said they had signed up with the UCW on the 26th, but had not signed up when Mr. Hart made his demand on Mr. Bryan on the 14th. As near

as I can tell from the testimony of the laborers,
page 2528 } there is no telling how they might have voted had they been given the opportunity to do so secretly. They were just joining to make sure they kept their jobs.

In addition to that, there is a lot of doubt, it seems to me, under the labor laws, and I think there is no doubt when Mr. Bryan was talking about his contracts with the A. F. of L. and when he was testifying to the fact that it wouldn't work to have A. F. of L. and UCW on the same property, and when he testified that "Almost all my people scattered all over the Southeast already belong to the A. F. of L.," what he was saying, translated into words of art, is that he doubts the appropriateness of the unit. There isn't any doubt about that. It is just a lay way of saying, "I doubt that the unit which you want to represent the people is appropriate for the purpose." He is merely stating the reasons, not the legal conclusion.

There was a recent case in Kentucky involving this section of the law and another section of the law, Section 336.040, which section, for your convenience, I will read. Section

336.040 provides, in effect, that the Department of Industrial Relations shall encourage, promote, and develop fair practices both by employer and employees, and shall discourage and eliminate as far as practicable all unfair practices by either, and shall enforce the laws relating to the same.

There was a recent case in Kentucky, decided page 2529 } this year, *Blue Boar Cafeteria v. Hackett*, decided on the 17th of February, 1950, 7 Labor Cases, Paragraph 55,618, which involved an attempt by the Commissioner of Industrial Relations in Kentucky to come to the Blue Boar Restaurant and conduct an election among the employees on company time and on company premises.

The actual cause of action was brought by the owner of the restaurant to enjoin the Commissioner of Industrial Relations from doing that, and the court enjoined him, stating that the two sections of the Code we have been talking about did not authorize him to take any such action as that.

I don't think that particular decision has any real significance here, because they left open the question whether or not he might take an election at some other time and at some other place, but they did say in the case:

"Though it does not seem material to the decision, it may be observed that there is no assertion of any hazard to the safety or health of the plaintiff's employees or any unfair labor practices * * *."

I say that is significant because if the law obligates me to recognize people just out of hand upon Mr. Hart's say-so, that is what must have been the fact in the Blue Boar Restaurant case. Otherwise there would have been no need for an election.

page 2530 } It seems to me that Kentucky case is saying that the refusal to recognize somebody is not an unfair labor practice under Kentucky law. Of course, it is only dicta, because they say in the opinion that it does not seem to be material to the decision.

They do say that they cannot imply from Section 336.130 any right on the part of the Commissioner to hold such an election against the wishes of the employer.

On the basis of my investigation of the law, I do not believe the Kentucky statute requires us to bargain with anybody. It doesn't say so. I don't believe that was the purpose of it. I don't believe that was what it was intended to do, and I don't think it does it.

Furthermore, even if it did require that, I do not think it requires it in every instance. I think it is bound to be so

in a case where there is a doubt as to the appropriateness of the group or in a case where there is doubt as to whether the union really represents them or not. When the employer in good faith has that doubt, he cannot be guilty of any unlawful act in refusing to recognize them under such circumstances.

I might add that I am in doubt if these people were in compliance. They could have gotten a determination of their rights under the National Labor Relations Act. I am quite certain. They didn't elect to do that. In fact, page 2531 } as I understand the testimony of the witness Fohl, they do it some other way. They don't fool with this Board which has been established as the method for determining such questions.

On the basis of what I have said, I object to Instruction C, because in Instruction C the way it is written, by inserting the words "common laborers and carpenter helpers" and connecting that up with the phrase "to designate collectively representatives of their own choosing," the implication, it seems to me, is unavoidable that the Court is determining that this was an appropriate unit. I don't believe the Court is in a position to do that.

Coming to Instruction F, which reads:

"Under the law the plaintiff had the duty to bargain collectively with the representatives of its common laborers and carpenter helpers. If you believe that any of the defendants was the representative of such employees and that the plaintiff refused to bargain with them, then the plaintiff acted unlawfully."

I do not believe that the law of Kentucky obligates anyone to bargain collectively with anybody.

To be honest about it, I don't understand what they mean in Instruction T, because if there was unlawful interference by the plaintiff, it wouldn't make any difference whether it was in concert with the American Federation of Labor or not. I am not sure I understand what they are driving at. I don't object to that one as much as I do Instruction F, page 2532 } which I think is clearly wrong on law as written.

Mr. Moore: Do you believe Instruction C could be straightened up by putting the words "employees" in?

Mr. Lowden: I would have no objection to Instruction C if they wrote Instruction C the same way they did Instruction D. "The employees of the plaintiff, including common laborers and carpenter helpers, had the right * * *." I wouldn't

object to C so amended. That was objected to, and that is the way Your Honor fixed it before.

The Court: Do any of you gentlemen have any comments to make?

Mr. Allen: We have the close on it, haven't we?

The Court: Yes.

Mr. Mullen: If Your Honor please, in the first place we have had no opportunity to read those cases, and it is now late in the afternoon.

Mr. Lowden: I might say I tried to quote them as fairly as I know how to do it.

Mr. Mullen: In the second place, in so far as they refer to the statutes, they are statutes of different States, and we are concerned with the statute of Kentucky. The statute of Kentucky negatives the argument that he has made. It negatives the argument that they do not have to bargain with employees. It negatives the argument as to the question of whether this was a proper union to bargain. The page 2533 } statute says:

"Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare."

If that means anything, where it says they may "designate collectively representatives of their own choosing and negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare," the person with whom they would negotiate is the employer.

The statute would have no meaning unless that right must be exercised and must be recognized by the employer.

It also says, "employees collectively and individually." There goes out your question of whether there is the proper unit.

"Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes."

I think that that language in the statute itself can have no other meaning than that the employer must negotiate with them.

Also, in these cases, the employer in a labor dispute or

labor matter comes under the National Labor
 page 2534 } Relations Act, which requires an employer to ne-
 gotiate.

They have come down here to Richmond, and they require it. If there is a dispute and if an employer is refusing to negotiate, the National Labor Relations Board can call for an election and require them to do it. They have done it right here. This company certainly comes under that much of the Federal Act.

I asked if they had ever been certified by the National Labor Relations Board, and the reply was, neither the union here nor in Kentucky had been certified as the bargaining agent for the employees of Laburnum.

That being the case, these common laborers and carpenter helpers were free, under the Kentucky statute, to organize as a union and to require bargaining with their chosen representatives.

Instruction C follows the language of the statute, and applies it in this case. It follows the specific wording of the Blandford case. We are entitled to that. We are dealing solely with the laborers.

We submit that we have a right to apply the statute to the case in question, that is, to those laborers whom we are claiming we represented and who we claim had the right to organize, regardless of what the A. F. of L. members in the skilled workers did. The A. F. of L. union had no control over these people in any way, shape, or form. They could not,
 page 2535 } by making any agreement with Laburnum, give themselves the right in any way to control the common laborers, who were not members of their union, whom they didn't recognize in any way, and say, "Regardless of what you say, without giving you any choice in the matter, we represent you." That is something that they couldn't possibly do.

The laborers and the carpenter helpers had the right, free from restraint and coercion, to associate themselves for self-organization.

Instructions F and T. "Under the law, the plaintiff had the duty to bargain collectively with the common laborers and carpenter helpers." We submit that under the law of Kentucky and the wording of the statute, after they had organized, after they had appointed men of their own choosing to negotiate, and the testimony is that in that meeting on the 24th they elected a committee of stewards from their number to negotiate, in connection with Hart, with the Laburnum Corporation, and the Laburnum Corporation refused to negotiate, said there was nothing to negotiate, and from beginning

to end refused to recognize their rights under the Kentucky statute.

"If you believe that any of the defendants was the representative of such employees and that the plaintiff refused to bargain with them, then the plaintiff acted unlawfully." That is F.

page 2536 } T says:

"Under the law the defendants had the right to organize or attempt to organize the plaintiff's common laborers and carpenter helpers. If you believe that the plaintiff acted in concert with the American Federation of Labor to interfere with such rights of any of the defendants, then the plaintiff acted unlawfully."

The plaintiff acted unlawfully if it did cooperate or work with the American Federation of Labor, whether it interfered with the rights of the defendants or not. It is not permitted under the law to cooperate with the union in any matter involving labor.

Mr. Robertson: Under what law?

Mr. Mullen: Under the Taft-Hartley Act, for one.

Mr. Robertson: They are not under the Taft-Hartley Act.

Mr. Mullen: You certainly are under the Taft-Hartley Act. All labor in this country is under the Taft-Hartley Act.

Mr. Allen: Have you finished?

Mr. Mullen: No.

It is a corporation of this State, doing business in another State.

Mr. Fred G. Pollard: Your Honor, this situation, addressing myself to Instruction F, is not so mysterious page 2537 } as the plaintiffs would have the Court believe.

Mr. Lowden made a very learned dissertation on what he had looked into, but those cases he looked into were all cases where a labor union or members of a labor union were seeking to enforce rights under statutes of this kind, the Kentucky statute. It is well known that there are certain statutes which grant rights, but nevertheless they don't create any substantive rights upon which you can bring a suit, or they do not create a cause of action. Those were the cases to which he referred.

Our only position under that statute is that the statute gives us the right to organize collectively and to designate representatives to negotiate contracts.

The second section says that employers shall not engage in unfair or illegal acts.

If the first section gives us the right to organize, to negotiate contracts, and an employer won't negotiate with us, then the statute means nothing; but the second section says they shall not engage in unfair acts as employers.

If you look at our instruction, all it says is that if you believe that any of the defendants were the representatives—there is your jury question—and if you further believe the plaintiff failed to bargain with them. First they have to believe that they were the representatives; and second, they have to believe he failed to bargain, then he acted unlawfully.

If we can't have that instruction, the Kentucky page 2538 } statute means nothing.

To go back to Mr. Lowden's objection to our Instruction C, he feels that we should not be allowed to have the phrase, "plaintiff's common laborers and carpenter helpers." The undisputed evidence is that all other employees were organized. They are the employees with whom we are concerned in this case. We certainly should have the right to bring the statutes down to the facts of this case, and that is all that that instruction does.

In Instruction T, all the first sentence does it tell the jury that it was lawful for us to attempt to organize the plaintiff's common laborers and carpenter helpers. I don't think they will dispute that we had a right to attempt to organize them, and organize them if we could.

The second sentence, all it says is that the plaintiff did not have a right to interfere with our right to organize. That is our business. It is the reverse of the plaintiff's case. The plaintiff says that "We were in business out there and you unlawfully interfered with our business." This instruction says that the defendants were in the business of organizing labor, which is lawful, and all we ask the Court to say is, if the plaintiff interfered with the defendants' business in the same way that the plaintiff claims that we interfered with its business, then the plaintiff's acts were not lawful.

Colonel Harris: I want to say a word.
page 2539 } As I have marked it, Your Honor, this morning Your Honor tentatively approved Instruction C.

The Court: Yes.

Colonel Harris: What they are contending on C goes contrary to the practical realities of American life that Your Honor is no doubt familiar with. Your Honor knows that there are hundreds and hundreds of thousands of laboring men in America organized in different craft unions under the

A. F. of L., and to my mind, it is departing from what we have seen happening all over America to say now that a bunch of men who do not qualify for the crafts that are organized in the industry cannot themselves organize. In other words, they don't have the qualifications to join the A. F. of L., so they can't get in the A. F. of L. The A. F. of L. makes no effort to take them in, and they are left completely without any rights whatsoever. Everybody else in America has it.

I haven't found any case anywhere that held that laboring men didn't have the right to organize into a union. All laws that have been passed to take greater control of labor that I have run across, somewhere have the statement that a laboring man may join a union of his own choosing.

What they say is that all the practices of America and all the laws of America that give a laboring man a right to say what union he will go into, are completely thrown
 page 2540 } aside by a bunch of A. F. of L. carpenters having a union, and excluding these carpenter helpers and common laborers.

It seems to me that they are asking this Court to shut its eyes to what has been going on in America in State after State, and a right that, as an American citizen, each one of these laborers had. Nobody could say, "We won't take you in. We will keep you out, and you people who are outcasts and pariahs under our craft organization, you can't have anything. We won't take you in, and we won't let you form one of your own."

So it seems to me that C, as tentatively approved by Your Honor, is a plain, common sense instruction based on the realities of American life, and not on any fanciful idea which has not been adopted by the courts.

Mr. Fred G. Pollard: May I end this by saying that the Instructions F and T are just as simple as this, Your Honor: If you have a right of any kind, and I interfere with it, I have acted unlawfully. All those two instructions do is to state the defendants' rights, and say that if the plaintiff interfered, the plaintiff acted unlawfully. Those two instructions are just that simple, Your Honor.

The Court: You contend, then, that it was unlawful for the plaintiff to refuse to bargain with the representatives of the common laborers?

Mr. Fred G. Pollard: If the jury believes,
 page 2541 } first, that the defendants were the representatives, and if they believe that the plaintiff refused to bargain.

The Court: Isn't the gist of the question whether or not he had a right to refuse to bargain? Isn't that the meat in

the coconut? And, if he did refuse, whether or not it was unlawful?

Mr. Fred G. Pollard: That is correct. I believe that is the meat of that instruction.

The Court: I might want to hear from you further, but I will still give you gentlemen a chance to close.

Mr. Lowden: Of course, we are in this position now, Judge. Mr. Mullen says they have the right under the National Labor Relations Act. Mr. Pollard says that get it under the law of Kentucky. Neither gentleman has cited a single case in support of their contention, not a one. They haven't cited anything, and I don't think they can find any to cite.

Let's stick to F for a moment. Take the National Labor Relations Act. I am going to demonstrate why it hasn't any application, in just a minute.

Section 7 of that Act provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collectively bargaining and other mutual aid or protection. They shall also have the right to refrain from any and all such activities except to the extent that the right may be affected by an agreement requiring membership in a labor organization as a condition to employment as authorized in Section 8(a)(3)."

So in Section 7 of the National Labor Relations Act, they give them the same right as they are given in Section 1 of the Kentucky statute.

But they come over in the next section, Section 8(a)(5), and say:

"It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of Section 9(a)."

They go on and expressly say that there is a duty to bargain, because when you come over to Section 10, they authorize an administrative tribunal to prevent unfair labor practices and to compel them to bargain if they don't, when all the conditions are met. There isn't any such provision as that in the law of Kentucky.

The State Court that came closest to that was the Wisconsin Court, but in Wisconsin they found it necessary to enact

a law patterned after this, since that case, to require people to bargain collectively.
page 2543 } This is kind of A, B, C, stuff, but it looks like we have to go into it.

Under the National Labor Relations Act, where you have all these rights spelled out and all these obligations spelled out, this is the general rule, and there is no doubt about this:

"The employer's statutory obligation to bargain collectively does not exist where the union fails to provide satisfactory proof of its majority claim when requested by the employer. Thus, where an employer is in genuine doubt as to a union's majority status, his refusal to bargain for that reason does not constitute an unfair labor practice."

That is under the statute where it expressly says refusal to bargain is an unfair labor practice. There never has been any doubt about this point at all, and if there is any doubt about it, the refusal is not an unfair labor practice.

Mr. Mullen: May I ask you a question? Doesn't that say where the employer requested evidence that he had a majority?

Mr. Lowden: That is two points. I read the whole paragraph.

I think the law under the National Labor Relations Act is that if a union representative comes to the employer and says, "I represent a majority of your people," page 2544 } the employer, if he wants to see his credentials, should ask for them. In this case we have people signed up in two unions known to the employer. If you don't think there was doubt about who actually represented those laborers, that is for you to argue, but I can't see how you can avoid that.

Mr. Mullen: I was just asking you if, under that statute, he must request it; if you haven't denied that your man ever asked for it or that it was refused him?

Mr. Lowden: Let's get this straight. I am not kidding anybody. I am putting it out exactly right, whether it hurts or doesn't hurt. I am not trying to kid any person. I want these instructions to be right, and we are going to get them so you get more than what is coming to you just to make sure—

The Court: Answer Mr. Mullen's question. I don't believe you answered his question, what the section stated.

Mr. Lowden: "The employer's statutory obligation to bargain collectively does not exist where the union fails to provide satisfactory proof of its majority claim when requested

by the employer. Thus, where an employer is in genuine doubt as to the union's majority status, his refusal to bargain for that reason does not constitute an unfair labor practice."

That is just A, B. C.

Then there is another section, and if Your page 2545 } Honor wants it, I will get you some cases on this.

The Court: I am going to decide one way or the other tonight.

Mr. Lowden: This is also the law:

"The Board must also determine whether the unit in which the union represents a majority of the employees is appropriate for purposes of collective bargaining before it may hold an employer refusing to bargain with the union has refused to bargain in violation of the Act."

So if he refuses to bargain in good faith doubt, the Board can't go to court and get an injunction against the man to compel him to bargain.

The Court: Therefore, you contend it would not be unlawful to refuse to do it?

Mr. Lowden: That is right. I also think, I contend further, that the law of Kentucky does not impose a duty to bargain. I can't find any case on any statute that would indicate that it does.

Mr. Robertson: We haven't finished yet.

Mr. Fred G. Pollard: I wanted to make a suggestion, with the leave of the Court, if I may. I think perhaps we should reword this instruction to meet the plaintiff's objection to it.

The Court: All right.

Mr. Robertson: Which one are you talking about?

Mr. Fred G. Pollard: Instruction F. We of page 2546 } fer this as Defendants' Instruction F-1:

"Under the law the plaintiff's common laborers and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe the plaintiff interfered with this right, then the plaintiff acted unlawfully."

Mr. Robertson: There is no evidence to support the last part. The only evidence at all—and I think it is from the defendants' witnesses—is that they went in there to Delinger and told him they had signed up, and Delinger said, "All right, you have a right to sign up." That was never disputed by anybody, and as I recall, that was the only evidence on that phase of the case.

Mr. Lowden: Except your witnesses said that nobody made them sign in the A. F. of L.

Mr. Fred G. Pollard: Mr. Bryan's testimony was that he told Delinger to get them signed up in the A. F. of L.

Mr. Allen: He had a right to do that.

Mr. Fred G. Pollard: No. That is interference.

Mr. Allen: No, it isn't, either. That is not interfering.

Mr. Mullen: It is making a company union.

Mr. Robertson: On what statute do you base that statement that it is interference?

page 2547 } Colonel Harris: Statute?

Mr. Lowden: What statute?

The Court: "Neither employers or their agents nor employees nor associations, organizations, or groups of employees, shall engage or be permitted to engage in unfair or illegal labor acts or practices * * *"

Mr. Fred G. Pollard: Let's go to the first sentence of paragraph (1). Instead of using the words "interfered with," go to paragraph (1) where it says, "Employees may, free from restraint or coercion by the employers or their agents * * *"; instead of the word "interference," we will use "restraint." "If you believe that plaintiff restrained * * *"

Mr. Allen: Let us finish our discussion, and let the Judge decide. Have you finished?

Mr. Fred G. Pollard: I think the instruction as redrafted should remove your objection.

Mr. Robertson: How does it read?

The Court: Let's write it down slowly. Dictate it and let me write it down.

Mr. Fred G. Pollard: "Under the law the plaintiff's common labors and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe the plaintiff restrained or coerced such employees in the exercise of these rights, then the plaintiff acted unlawfully."

page 2548 } The Court: You are offering that in lieu of F?

Mr. Fred G. Pollard: Yes, sir.

The only question there, it seems to me, would be whether there was any evidence to go to the jury on the question of restraint and coercion. We say that there is a jury question on that, because Mr. Bryan testified that he told Delinger to get them signed up in the A. F. of L., and I recollect Mr. Mullen's question, "What chance does a laborer have to refuse when word came down that the big boss said 'Sign up in the A. F. of L.'?"

We think we have a right to argue to the jury that that amounts to restraint or coercion, and I can produce a dozen

Labor Board cases that say that is restraint or coercion. I don't think that Mr. Lowden will take issue with me on that, that the cases do hold that that does amount to restraint or coercion.

Mr. Lowden: Let me understand. Are you going to offer this in place of the one you have as F?

The Court: Yes, a substitute.

Mr. Fred G. Pollard: Call it F-1.

The Court: I don't know whether you want to talk any more on F. I will grant F as offered.

Mr. Robertson: As now offered?

The Court: As now offered.

Mr. Lowden: May we have an exception for the record?

The Court: Yes.

page 2549 } Now we go to T.

Mr. Robertson: Isn't that another duplication?

Mr. Fred G. Pollard: The only difference between this one and F is that F says the employees had a right to organize. T says that the defendants had the right to organize or attempt to organize those same employees. That is the only difference between the two.

Mr. Lowden: I didn't hear that, Freddie, I am sorry. I went to sleep.

Mr. Fred G. Pollard: F says that the employees had the right to organize for purposes of collective bargaining. T says that the defendants had the right to organize the employees or to attempt to organize them.

Mr. Lowden: I agree with that.

The Court: Down to the period, there is no objection?

Mr. Lowden: That is right, sir.

Mr. Fred G. Pollard: We think there is evidence to go to the jury that there was concerted action on the part of the plaintiff acting with the A. F. of L. to interfere with our rights to attempt to organize these common laborers. In other words, the evidence is that Bryan told Delinger to get them signed up, and Delinger got hold of Robert Poe and put Poe to work signing them up.

page 2550 } Mr. Mullen: Gave him time off with pay.

Mr. Fred G. Pollard: Poe was trying to make arrangements to get them in to sign.

The Court: Is that unlawful? Is that coercion?

Mr. Lowden: It is not.

Mr. Allen: It is not, under the cases I have here.

Mr. Robertson: We have no objection to the first sentence.

Mr. Lowden: It would have been unlawful if one of your

laborers had come to Delinger and said, "Will you give me time off to organize them for some other union," and he refused. Then I think he would have committed an unfair labor practice.

Mr. Fred G. Pollard: There is no question of an unfair labor practice. The question is, we had a right to do something, and the plaintiff and the A. F. of L. banded together to interfere with that right.

The Court: Shouldn't that then be "coercion"?

Mr. Fred G. Pollard: Restrain or coerce.

The Court: Doesn't it have to be restrain or coerce?

Mr. Allen: In answer to that, may I cite a few cases?

The Court: Just in concert with the American Federation of Labor may not be restraint or coercion. That is what is in my mind.

page 2551 } Mr. Fred G. Pollard: To substitute for the word "interfere," to "restrain or coerce."

Mr. Allen: There isn't any evidence on that whatsoever.

Mr. Robertson: There is no evidence on that.

The Court: I will write this down just for discussion: "Plaintiff acted in concert with the American Federation of Labor to restrain or coerce * * *."

Mr. Fred G. Pollard: " * * * restrain or coerce the exercise of such rights," and strike out "with."

We say there is evidence before the jury on the question of restraint, in this way, sir: Hart got out there on the 14th, and he signed up four people; and then on the night of the 24th, he had nine people at the meeting. Then on the 26th, he had them all signed up. Bryan's only testimony is that he told Delinger to get them signed up in the A. F. of L., and he said to change their classification to carpenters, to take them in the Salyersville local if possible. That was restraining us in the exercise of the right that we had to organize them without interference.

Mr. Lowden: Assuming that you are right, you still could argue it on the instruction you already have, as a matter of argument. The fact of the matter is that there were several laborers called as witnesses for the defendants who signed up on the 12th, and they all testified that they

page 2552 } signed up with the A. F. of L. of their own free will and without any restraint or coercion. That is their testimony. They all belong to the United Mine Workers of America now.

page 2553 } Mr. Allen: The Court in the case of *Edward G. Budd Manufacturing Co. v. National Labor Relations Board*, 142 Fed. 922, passed on this identical question and said this:

"The National Labor Relations Act does not forbid an employer from expressing opinions as to labor unions or as to anything else so long as the expressions do not constitute or contribute to acts or threats of discrimination, coercion or intimidation, or the denial of employees free exercise of their own rights under the Act."

In the case of *Continental Box Company v. National Labor Relations Board*, 113 Fed. (2d) 93, the Court said:

"An employer may express a preference for one union over another so long as the expression is not coercive."

And in the case of the *National Labor Relations Board v. American Shoe Vending Company*, 320 U. S. Supreme Court 668, the employer expressions regarding selection of a union and an attempt to persuade employees to accept them comes within the constitutional rights of free speech."

You talked about free speech of employees to picket and put up signs and persuade. That same right of free speech belongs to the employer.

I have a case right here in the Fourth Circuit decided in 120 Fed. (2d), *National Labor Relations Board v. Clarksburg Publishing Company*. The Court said:

page 2554 } "An employer may express an opinion if it carries no threat of discrimination and does not interfere with attempts to organize."

In the case of *Jacisonville Paper Company v. National Labor Relations Board*, 137 Fed. (2d) 148, *certiorari* denied, 320 U. S. 772, the court said:

"An employer has the right to express his hostility to the union and his opinion of the * * * union."

There isn't a particle of evidence in the case that is not perfectly in harmony with these holdings.

Mr. Moore: Mr. Allen, you might add one more case and cite *Virginia Electric Power Company v. National Labor Relations Board*—

Mr. Allen: That is right.

Mr. Moore: —as long as you are getting personal about it.

Mr. Allen: That is right. I have that somewhere too. That went to the United States Supreme Court and that is what they said.

Mr. Lowden: Judge, how have you got C?

The Court: What about it?

Mr. Lowden: We have a proposition coming up.

The Court: Good. I always like to hear propositions.

Mr. Fred G. Pollard: The proposition is if they will withdraw their objection to C we will withdraw Instruction T.

page 2555 }
The Court: Do you agree to that? I left it that plaintiff's common laborers and carpenters helpers had a right free from restraint or coercion by the plaintiff or his agents.

Mr. Allen: Read it as you tentatively propose to give it.

The Court: I will read the whole Instruction C:

"The plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably.

"In the exercise of the above rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interference.

"The above rights are not lost because others who are not employees of the plaintiff join with them in asserting the employees' rights.

"Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character."

page 2556 }

Mr. Robertson: We agree to that.

The Court: Very well.

Mr. Moore: "T" is withdrawn.

The Court: "T" is withdrawn and C is given.

Mr. Mullen: That concludes everything in ours.

The Court: I think we have to go back to one or two.

Mr. Robertson: We go to 1-B now.

The Court: That completes the defendants instructions, does it not?

Mr. Mullen: Yes. I want to say but one word about 1-B. Mr. Robertson himself said here today there is no conspiracy charge in this case, and therefore the conspiracy statute has no bearing on it.

Mr. Robertson: I also said yesterday that I wanted overnight to decide whether or not I thought we were entitled to

it because I didn't want to ask for it unless I thought we were entitled to it. I have been over it. I have reviewed the bus and streetcar cases that I have tried time and time again and the way they apply the traffic laws. I have conferred with everybody else here on our side, and we think we are entitled to it on the strength of those decisions because the felony statute includes within it civil page 2557 } rights.

Mr. Mullen: They went to the fact that there was carelessness, and so forth, in those same things. It was civil there; that wasn't criminal.

Mr. Allen: "band themselves together. That means getting together and going somewhere for the purpose of intimidating.

Mr. Mullen: It is conspiracy.

Mr. Robertson: Do you think bargain collectively through representatives of your own choosing is a conspiracy?

Mr. Mullen: No. That is a contradiction of that.

The Court: Let me hear the objection and then you close.

Mr. Mullen: That is all I am going to say because I don't want to prolong this thing.

The Court: Fred, do you want to say anything?

Mr. Fred G. Pollard: Yes, sir, in just a moment.

Mr. Allen: You didn't pass over 9 and 10 of ours, did you?

The Court: No. They have been given. You brought redrafted copies of them this morning.

Mr. Allen: That is right.

Mr. Fred G. Pollard: Judge, the only thing I have to say on this is that there is evidence of intimidation, although we don't think it true, but there is no evidence that page 2558 } they confederated or banded together for that purpose and that they had a view of inflicting punishment before they went down there.

The Court: What was the last statement, Fred?

Mr. Fred G. Pollard: The last part of the statute says "Or of taking any person charged with a public offense from lawful custody with a view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act."

None of that applies.

Mr. Lowden: When I first wrote it up I didn't have it in there. Then I thought it fairer to quote the whole statute. If you want to strike the last part of it, I will accept that amendment.

Mr. Mullen: We don't agree to that. The whole statute should go out. As I said, it is the Ku-Klux-Klan statute. That is what it is. That is what it was passed for.

Mr. Lowden: But it has been applied to Mine Workers.

Mr. Moore: They include the mine workers under it.

Mr. Fred G. Pollard: There is no charge in the notice of motion of any conspiracy.

The Court: That is what concerns me.

Mr. Allen: A gang of men got together.

Mr. Fred G. Pollard: Your Honor, I think page 2559 } under Instruction 1-A, the second paragraph is certainly sufficient to cover anything the plaintiff's asked for. That says "Neither employees or their agents nor employees or associates, organizations, or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

It is perfectly clear that that is the statute which is to define and deal with unlawful acts in the case of labor disputes because it ties right in to the labor statute. It certainly is sufficient for their purpose, and the other one obviously applies to cases other than labor or is intended so to apply.

Mr. Lowden: Do you want to say a word, Mr. Harris?

Colonel Harris: No. I think his last sentence hit what I would have argued.

Mr. Lowden: If Your Honor please, there are cases as long as your arm in Kentucky against the mine workers, at least two or three, individual mine workers, and some against the A. F. of L. pipefitters under that statute for going on a job and doing just exactly what these people did here. When you say there isn't any evidence that they came there for the purpose of intimidating somebody, it is just wrong because Mr. Hart said that that is exactly why he got the crowd. He said the reason we got together we wanted to show them how strong we were, to come down there and let them look us over.

page 2560 } Mr. Robertson: And do some butt kicking.

Mr. Lowden: He didn't testify to that, but he did admit that was the idea. If it was just to go down there and peaceably sign people up, you don't go down with 30 men to sign up 8 men unless you have some idea in mind that you will just scare them a little bit.

Why do we want the statute in there? My reason for wanting it in is this: If this jury believes they violated that statute, it has a bearing on our right to recover punitive damages. It is true we haven't alleged a big conspiracy. I think we have proved one, but we didn't allege it. But that design and its unlawfulness is a large element, it seems to me, in affecting the jury's discretion on punitive damages, and that is the purpose I had in mind in putting it in there.

The Court: Do I understand you to say that this section has been used in labor cases?

Mr. Lowden: Yes, sir.

Mr. Mullen: Criminal cases?

Mr. Lowden: Oh, yes, it is a criminal statute.

Mr. Allen: But concerning laborers.

Mr. Lowden: I read you one last night where the man did exactly what they did in our case. I will be glad to let your Honor look at it.

Mr. Moore: Here it is, Your Honor.

page 2561 } Mr. Lowden: It uses almost the same words.

Colonel Harris: There is one statement that Mr. Lowden made that I want to reply to, if the court pleases. He said Mr. Hart wanted to show them how strong they were, and then he implies that Mr. Hart meant by that to show them how strong they were in physical strength, and we submit that the proper and reasonable interpretation of that is how strong the organization was proceeding in getting the men that it had. You see, the undisputed evidence is that these men were men who lived in that general neighborhood and some of them worked for Codell, and they were all men whom Hart was organizing.

Mr. Robertson: That is jury argument. You have a right to argue that.

Colonel Harris: I know, but he is arguing—

Mr. Robertson: He has a right to argue.

Mr. Lowden: We have a right to argue what I said to the jury.

Mr. Robertson: He has a right to argue.

Mr. Robert N. Pollard: Could I add this: They might as well present also the criminal statute on mayhem, the criminal statute on assault, the criminal statute on malicious wounding, as to present this statute in the form of an instruction.

Mr. Lowden: No. We haven't any evidence
page 2562 } of any malicious wounding and if we did, maybe
we would ask for that statute too.

Mr. Mullen: You have no evidence of conspiracy. You say there is no conspiracy charge in this case.

Mr. Fred G. Pollard: I want to point out one other thing, Your Honor. The statute 336.130 is not a criminal statute. There is a serious matter in my mind that a criminal statute has any place in the instructions in this case. In the third place, if they have been convicted under that statute, it wouldn't be admissible that they had been convicted under it. In an automobile case you can't show a conviction for careless and reckless driving in a civil suit for damages.

The Court: You do cite a statute that it is unlawful to operate a vehicle over the highways in a reckless manner.

Mr. Fred G. Pollard: It is true. You do that to show what the speed limit is, and there is a Virginia statute I believe dealing with civil liability on that. In this case the mere fact that the defendant or some of the people out there would have violated 427.110 would not give the plaintiff a cause of action. He is suing for interference with his business. There is nothing that would connect this with business interference.

The Court: Are you through now?

page 2563 } Mr. Fred G. Pollard: Yes.

The Court: All right, wind it up.

Mr. Lowden: I was just going to say I don't think that statute is the basis of a cause of action, but I think it has a lot to do with punitive damages and I think we have a right to show that what they did was unlawful right from the beginning. I think we have shown that they started at Carver on Sunday themselves.

The Court: Are you in accord with the views of these gentlemen?

Mr. Allen: Yes.

Mr. Moore: Yes.

The Court: Gentlemen, I think I will give this instruction, 1-B.

Mr. Fred G. Pollard: That is referred to as 1-B, Your Honor.

The Court: 1-B.

Mr. Fred G. Pollard: The defendants except to the granting of Instruction 1-B for the reasons stated.

The Court: Gentlemen, it might save you a lot of time and waiting around here if we can agree on an instruction on the verdict. While the jury is out I find sometimes they delay coming in because of not knowing how to write the verdict.

Mr. Lowden: This one doesn't quite do that.

page 2564 } Mr. Robertson: I tell you, Judge, here is one thing I had seriously in my mind last night. I went home and tried to write up a form of it, and I had so much difficulty that I asked Mr. Lowden and Mr. Moore to work separately, and they came up with that. I wondered whether if the Court would tell the jury when they agree, they tell the Court that they have agreed and on what, and the Court would help them getting the verdict in proper form would simplify it. While I think this thing is very skillfully done, I don't think it is simple.

Mr. Mullen: I think the one as first offered was much simpler than that.

Mr. Lowden: But the way it was first offered it was not right from anybody's point of view. What you get down to is that you have a multiplicity of things they might do.

Mr. Allen: I believe it would be confusing to give them a long instruction on that. Let the jury render the verdict in accordance with the general instructions that you give and then tell them if they have any trouble about the form of the verdict, come back and tell you what they have found.

The Court: "When you have reached a verdict the Court will aid you upon request in putting your verdict in proper form." Are you gentlemen in accord on that?

page 2565 } Mr. Mullen: I am in accord with Mr. Robertson's suggestion. Let the Judge tell them afterwards that he will help them with the form of verdict.

The Court: In other words, I will tell the jury at the conclusion of the reading of the instructions this: "When you have reached a verdict the Court will, upon request, aid you in putting your verdict into a proper form."

Mr. Mullen: That is right.

Mr. Lowden: Then, Judge, there is one thing they have brought up which I agree with them on, and it is not covered in anybody's instructions up to now, and I think it should be covered. That is, I do not think that they can find compensatory damages against the United Mine Workers unless they also find them against either UCW or District 50. I think they should be told that. I do not believe you can hold the principal without also holding the agent.

Mr. Allen: That is in one of our instructions.

Mr. Robertson: Compensatory damages cannot be in varying amounts.

The Court: What is that?

Mr. Robertson: That is covered in that long thing, too.

Mr. Moore: You can't find different amounts of compensatory damages as to the various defendants. It has to be one amount.

page 2566 } Colonel Harris: Judge, I have a criticism of your other statement that you would tell the jury that when you have reached a verdict the Court will aid you in putting it in proper form. That indicates that their verdict is going to be complicated, and it would be very simple for a verdict to come in and say, "We the jury find for the defendants." So instead of aiding them to put it in proper form, I think the Court should tell them, "When you arrive at a verdict let me know and the Court will put it in proper form for you."

Mr. Lowden: I agree with that.

Mr. Robertson: Rather than have all these complications, I feel it should be the way you wrote it up.

The Court: I still feel if we could get an instruction on the form of verdict it would be helpful.

Mr. Allen: I am inclined to agree with Colonel Harris on that.

Mr. Lowden: I think you are absolutely right.

The Court: I will leave it to your discretion, but I find it very helpful if we can get a form of verdict.

"The Court instructs the jury as follows:

"1. That if you believe compensatory damages should be awarded, you should be guided in your award as follows:

page 2567 } "(a) You can make only one total award of compensatory damages, for which award you should designate which defendants, if any, are liable.

"(b) You cannot find against U. M. W. A. for compensatory damages unless you also find against U. C. W. and District 50 for compensatory damages.

"(c) Your total award for compensatory damages cannot exceed \$....."

That should be the amount sued for. I don't know whether that should go in.

Mr. Allen: I don't know whether that should be put in there at all or not. The compensatory damages couldn't be \$500,000 because that is not claimed. I would leave out (c).

The Court: "2. That if you believe punitive damages should be awarded, you should be guided in your award as follows:

"(a) You may award punitive damages in varying amounts against each defendant found to be liable for punitive damages or you may find one amount of punitive damages and designate the defendant or defendants jointly liable therefor.

"(b) If you make awards of punitive damages in varying amounts the total of such awards may not exceed \$....."

Mr. Robertson: That ought to come out, too.

page 2568 } The Court: "(c) If you make one award of punitive damages and designate one or more de-

defendants jointly liable therefor, the award cannot exceed \$....."

Mr. Robertson: Yes. I think three ought to come out too. It is just what we have been saying you don't do in Virginia.

The Court: In this first form we told them how to write the verdict, didn't we, the form of the verdict?

Mr. Robertson: We didn't have it right.

Mr. Moore: There was still a possibility that wasn't covered by that form.

Why couldn't this be improved on to make it right?

"We the jury on the issues joined find for the plaintiff—"

Mr. Robertson: Here is why you can't make it right. Suppose they bring in a verdict of punitive damages against all three defendants in varying amounts, you would have to have three forms for that. Then you would have to fix it—I don't know enough mathematics to know how many different combinations are possible.

Mr. Lowden: There is a lot of them.

Mr. Moore: I can say the possibilities are almost endless.

Mr. Robertson: Let me say this, Judge. Suppose you give it the way we are in agreement on now. I page 2569 } think "3" ought to cut out.

Mr. Moore: You have to tell them the total can't be more than the amount claimed in the notice of motion for judgment.

Mr. Robertson: Then leave "4" the way Colonel Harris suggested.

Mr. Lowden: Let's take 3 out altogether.

Mr. Mullen: I believe it would be better for the Judge to tell them he will help them on the verdict.

Mr. Allen: What was the language you used, Colonel Harris?

Colonel Harris: "When you let know that you have reached a verdict, the Court will put it in proper form for you."

The Court: "When you have reached a verdict—"

Colonel Harris: "—if you will let me know, the Court will put it in proper form for you." "If you will advise me," is better.

The Court: "When you have reached a verdict, if you will advise me, the Court will put your verdict in proper form."

Mr. Robertson: That is all right.

Colonel Harris: Do you see any objection to that?

The Court: All right.

Mr. Robertson: There is nothing for us to write up.

Mr. Fred G. Pollard: Your Honor, we think page 2570 } we ought to have a chance to go over their instructions as redrafted in accordance with the order of the Court and I am sure they would like to look at ours.

The Court: Will it be satisfactory to meet here at 9:30 in the morning?

Colonel Harris: Yes.

The Court: Let's try to be here at 9:30 promptly and we will go into that matter.

(Whereupon, at 6:15 o'clock p. m. the conference recessed until 9:30 o'clock a. m. the next day.)

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City Hall,
Richmond, Virginia
Friday, February 16, 1951

Met in chambers, pursuant to recess, at 9:30 a. m.

Before: Hon. Harold F. Snead.

Appearances: Archibald G. Robertson, George E. Allen, T. Justin Moore, Jr., Francis V. Lowden, Jr., Counsel for the Plaintiff.

James Mullen, Fred G. Pollard, Colonel Crampton Harris, Counsel for the Defendants.

Also Present: Robert N. Pollard, Willard P. Owens.

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PROCEEDINGS.

(The following proceedings were had in Chambers:)

(Defendants' Instruction J (redraft) follows:)

"The jury is instructed that:

"A part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

“(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff is entitled to recover against that defendant.

“(b) No damages can be awarded unless you also find that the damages were directly and proximately caused by the alleged wrongful acts of one or more of the defendants.

“(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

“(d) The plaintiff has the burden of proving with reasonable certainty the profits that it claims as damages. If you cannot determine profits from the evidence with reasonable certainty, then you cannot award any damages based on the profits the plaintiff claims it would have earned.

“(e) If you believe from the evidence that the profits, if any, of Virginia Mechanical Corporation should page 2573 } not be included in the profits, if any, of the plaintiff then you must deduct such profits, if any, from the plaintiff's claim.”

Mr. Fred G. Pollard: I think I should call the Court's attention to Instruction J, paragraph (e). You remember paragraph (e) was redrafted and we used Mr. Robertson's language. I took the liberty of making a change in that one. The only change is in the last line on the page. I stuck in “if any.”

The Court: I refused the whole instruction, and you were going to rewrite it under the Court's ruling.

Mr. Fred G. Pollard: I did, except that I added in the last line “if any.”

The Court: Is there any objection to that?

Robertson: No.

Mr. Allen: I think you might tell the jury, as I think you always do, that all the instructions are the instructions of the Court and must be read and considered together.

Mr. Robertson: Here is the verdict 1 that we talked about last night.

Mr. Mullen: I thought we settled that the Judge would tell him that the judge would help them put it in proper form when they arrived at the verdict.

Mr. Robertson: I thought it was to be this way.

The Court: There was discussion both ways. page 2574 } but I was under the impression that the Court was to tell them the verdict would be put in proper form.

Mr. Robertson: I have it at the end there.

The Court: Let's read this.

(Plaintiff's Instruction No. 11 follows:)

"1. That if you believe compensatory damages should be awarded, you should be guided in your award as follows:

"(a) You can make only one total award of compensatory damages, for which award you should designate which defendants, if any, are liable.

"(b) You cannot find against United Mine Workers of America for compensatory damages unless you also find against United Construction Workers, Division of District 50, United Mine Workers of America and District 50 United Mine Workers of America for Compensatory Damages.

"2. That if you believe punitive damages should be awarded, you should be guided in your award as follows:

"(a) You may award punitive damages in varying amounts against each defendant found to be liable for punitive damages or you may find one amount of punitive damages and designate the defendant or defendants jointly page 2575 } liable for such damages.

"3. When you have reached a verdict, if you will advise me the Court will put your verdict into proper form."

The Court: Is there any objection?

Mr. Mullen: Yes, we certainly object to that because it is entirely one-sided. It contemplates but one judgment, and that is in the favor of the plaintiff. There is nothing said about the other possibility.

The Court: We will proceed as indicated last evening.

Mr. Lowden: We withdraw that then.

Mr. Fred G. Pollard: You withdraw it?

The Court: Very well, it is withdrawn.

Mr. Allen: We are already clear on the instructions, but we are certainly going to argue and tell the jury that they cannot find against the United Mine Workers without finding against District 50 and United Construction Workers, because I think that is the law.

Mr. Pollard: Your Honor, I don't think there is any instruction on that.

Mr. Allen: If there is no instruction on that, why not let him give (b) of this instruction.

Mr. Mullen: What objection do we have to their arguing that?

Mr. Moore: It is all in your favor.

page 2576 } Mr. Lowden: The idea came from Mr. Harris when he said you can't hold the principal unless you hold the agent, and I think he is right. We are just trying to meet what you were hollering about a couple of days ago.

Mr. Allen: We offer (b) and if they object to it, it is all right.

Mr. Moore: It is also in Instruction 5.

Mr. Allen: It is supposed to be in five, but I don't know whether it is really clear in there or not. In that long five it is.

Mr. Fred G. Pollard: I would like to have that statement for the record.

Mr. Mullen: I think we should just leave it open and argue as they please.

Mr. Robertson: I expect to argue anything I have a right to argue under the instructions and the law, and if it is wrong you can stop me.

Mr. Mullen: I am sure you know the bounds of argument.

Mr. Allen: We are going to confine ourselves to the law and the issues.

The Court: Do I understand you are offering (b) or not, Mr. Allen?

Mr. Robertson: We are not offering it.

The Court: There is one thing I would like page 2577 } to take up with counsel for the plaintiffs. On

Wednesday morning a motion was made for a mistrial due to an editorial published in the News Leader. Do you gentlemen wish me to poll the jury to see whether or not they have read that editorial and whether or not it will have any influence?

Mr. Allen: My view of that is, so far as the record shows, you instructed the jury not to read any newspaper. They are presumed to follow that instruction unless there is evidence they did read newspapers. If these gentlemen on the other side want to ask the jurors that, we have no objection, but we don't see any occasion for us asking you to ask the jurors—

Mr. Robertson: We don't want it.

Mr. Allen: And we don't ask for it.

Mr. Fred G. Pollard: Our position, Your Honor, is that the editorial was so prejudicial that no instruction that you can make to the jury will cure it.

The Court: Do you gentlemen desire the Court to poll the jury on that question?

Mr. Fred G. Pollard: You indicated at the time the motion

was made that if the verdict went against the defendants they could renew their motion to set aside the verdict, and we would like to poll the jurors at that time, should that occasion arise.

The Court: Is that satisfactory to you gentlemen?
page 2578 } Mr. Robertson: No, sir. We will meet that issue when it comes up.

The Court: You are not asking me to poll the jury at this time.

Mr. Fred G. Pollard: In view of the fact that you indicated you would let us renew the motion after the verdict should the verdict go against the defendants, we are asking the Court whether or not we may poll the jury after the verdict.

The Court: But you are not asking the Court to poll the jury at this time?

Mr. Fred G. Pollard: Your Honor, the answer to that depends on whether or not you would permit us to poll it afterwards.

Mr. Robertson: If the Court please, I object to your passing on a moot question at this time.

The Court: I would prefer to defer ruling on that question until the time arises. What I am concerned about at the moment is whether or not you want the jury polled now.

Mr. Fred G. Pollard: Our decision on that of course depends on what our future rights are.

Mr. Robertson: Isn't the answer that he doesn't want them polled at this time?

Mr. Fred G. Pollard: May we confer on this,
page 2579 } Your Honor?

The Court: Certainly.

(Counsel conferring.)

Mr. Mullen: We are not going to ask at this time to have the jury polled.

The Court: All right.

(Whereupon, at 10:00 o'clock a. m., the above-entitled matter came on for oral argument in open court before The Honorable Harold F. Snead, Judge, and a Special Jury.)

(Roll call of the jury.)

Mr. Mullen: If Your Honor please, after the jury was allowed to go on Monday, this stipulation which counsel had been examining was filed with the agreement of counsel. We think it should be read now and introduced as evidence.

I won't read the heading. It is a stipulation.

"It is stipulated between the Plaintiff and the Defendants by their respective counsel that Pond Creek Pocahontas Company began to mine coal at No. 1 mine, Evanston, Kentucky, during June, 1949, and that a substantial part of such coal was shipped by the Chesapeake & Ohio Railway Company from the place it was mined at Evanston, Kentucky, to points outside of the State of Kentucky during June and July, 1949." Signed by Archibald G. Robertson, Counsel for Plaintiff, George E. Allen; and by James Mullen, counsel page 2580 } for the Defendants. We ask that that be filed with the Court.

The Court: Gentlemen of the Jury: You have listened attentively to the evidence in this rather long trial. It now becomes the duty of the Court to instruct you as to the law applicable to the evidence in this case. I call your attention to the fact that the instructions which will be read are to be read together and to be considered as a whole.

The Court instructs the jury that Baldwin's Revised Statutes of Kentucky (1948) provides as follows:

"Section 336.130:

"(1) Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. Employees collectively and individually may strike, engage in peaceful picketing, and assemble collectively for peaceful purposes.

"(2) Neither employers or their agents nor employees or associations, organizations or groups of employees shall engage or be permitted to engage in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

The Court instructs the jury that the Revised page 2581 } Statutes of Kentucky provides:

"437.110 *Conspiracy: banding together for unlawful purpose.*

"(1) No two or more persons shall confederate or band themselves together and go forth for the purpose of intimidating, alarming, disturbing or injuring any person, or of taking any person charged with a public offense from lawful custody with the view of inflicting punishment on him or of preventing his prosecution, or of doing any felonious act."

The Court instructs the jury the plaintiff had the right to employ and work men at its job site in Breathitt County, Kentucky, who were not members of United Construction Workers Division of District 50, United Mine Workers of America, or District 50, United Mine Workers of America, or United Mine Workers of America without threats of violence or acts of violence against such men, or intimidation of such men by anyone to induce such men to join United Construction Workers.

The Court instructs the jury that United Construction Workers is a division of District 50 and that District 50 is one of the districts of United Mine Workers of America.

The Court instructs the jury that a labor union can act only through its officers and agents, and it is responsible for the acts of its officers and agents done the scope page 2582 } of their authority or employment. An agent is one who by the authority of his principal transacts his principal's business or some part of it, and represents his principal in dealing with third persons.

It is admitted that William O. Hart and David Hunter were agents of United Construction Workers Division of District 50, United Mine Workers of America, and of District 50, United Mine Workers of America, at all times involved in this case; but it is for you to say whether they were then also agents of United Mine Workers of America, and whether during that period of time they committed the acts charged against them within the scope of their agency for United Construction Workers, or District 50, or United Mine Workers of America, or all of them.

The Court instructs the jury if you believe from the evidence that United Mine Workers of America was using United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America, as agents for the purpose of organizing the unorganized in businesses other than the coal mining business then United Mine Workers of America is liable for any wrongful acts of the agents and employees of United Construction Workers Division of District 50, United Mine Workers of America, and District 50, United Mine Workers of America.

while those agents were acting in the line and
page 2583 } scope of their employment for the purpose of or-
ganizing the unorganized.

The Court instructs the jury if you believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, Division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, then you will find for the plaintiff against the two defendants, District 50, United Mine Workers of America, and United Construction Workers, division of District 50, United Mine Workers of America, and assess plaintiff's damages in accordance with the instructions on damages.

And if you further believe from the evidence that William O. Hart, as a representative of District 50, United Mine Workers of America, and of United Construction Workers, division of District 50, United Mine Workers of America, while acting within the scope of his employment or authority, went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men and for the purpose of organizing plaintiff's employees, and that, by intimidation, threats, acts of violence or coercion, said Hart and his crowd of men caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, and that at that time District 50, United Mine Workers of America, and United Construction Workers, Division of District 50, United Mine Workers of America, or either of them, were agents of United Mine Workers of America for the purpose of organizing workers in businesses other than the coal mining business, then you shall also find for the plaintiff against the defendant, United Mine Workers of America, and assess the plaintiff's damages in accordance with the instruction on damages.

The Court instructs the jury that while employees may, free from restraint or coercion by employers or their agents, associate collectively for self-organization, and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare, and may, col-

lectively and individually, strike, engage in peaceful picketing, and assemble collectively for peaceful purposes, neither employees nor associations, organizations nor groups of employees, have the right to resort to violence, intimidation, threats or coercion.

page 2585 } If you believe from the evidence that William

O. Hart, was acting for United Construction Workers Division of District 50, United Mine Workers of America, and for District 50, United Mine Workers of America, and for United Mine Workers of America within the scope of his authority, and if you believe from the evidence that while he was so acting he went to plaintiff's job site in Breathitt County, Kentucky, on July 26, 1949, with a disorderly crowd of men, to organize plaintiff's employees, and if you believe from the evidence that he was then acting in furtherance of the business of all three defendants, and if you believe from the evidence that while so acting he, by intimidation, threats, acts of violence, or coercion, caused plaintiff's workmen to leave their job, and put them in such fear as to cause them to refuse to return to work thereafter, you will find for the plaintiff against all three defendants and assess plaintiff's damages in accordance with the instructions on damages.

The Court instructs the jury if you believe from the evidence (1) that William O. Hart was acting within the scope of his authority and employment and was acting for all the defendants for the purpose of "organizing the unorganized," and (2) that in furtherance of that purpose he was going about Eastern Kentucky leading men to various job sites

for the purpose of compelling by intimidation, page 2586 } coercion, or force the workers on such jobs to join one of the Defendants unions, or failing that, to stop the jobs, and (3) that such activities of Hart were known or reasonably should have been known to the defendants, and (4) that in furtherance of this purpose Hart led men to plaintiff's job site in Breathitt County for the purpose of compelling the employees of plaintiff to join one of the defendant unions, irrespective of such employees' wishes, and (5) that Hart or other at his direction, by means of threats and intimidation, backed up by overwhelming force, did in fact compel some employees of plaintiff to "sign up" with one of the defendants unions, and forced others to quit work, and (6) that Hart did such acts with utter disregard for the rights of the employees and with utter disregard for the rights of Plaintiff, and with the express and avowed purpose of forcing plaintiff to recognize one of the defendant unions or failing in that, forcing the plaintiff to get out of the territory.

then defendants are liable to plaintiff *no* only for all damages proximately resulting from such action but also for punitive damages if you deem it appropriate to award punitive damages under other instructions of the Court.

The Court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages, then in order to determine the amount of such damages you should consider any actual loss to the
page 2587 } plaintiff of

(1) Profits under its contract dated December 15, 1948, with Spring Fork Development Company, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

(2) Profits the plaintiff might have realized from alleged promised cost plus 5% contracts with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence that such profits are reasonably certain as defined in other instructions;

(3) Any loss, as defined in other instructions, to plaintiff from destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence such profits are reasonably certain as defined in other instructions; and

(4) Any loss to plaintiff from impairment of plaintiff's business reputation.

And you should return your verdict in such amount of compensatory damages as defined in other instructions on damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as a proximate result of the wrongful acts of the defendants or
any of them.

page 2588 } The Court instructs the jury that damages recoverable in actions like this, in the event plaintiff is entitled to recover, are of two kinds: (1) compensatory damages, and, (2) punitive damages.

(1) Compensatory damages are the measure of the loss or injury sustained and may embrace pecuniary loss suffered by the plaintiff, if any; a fair compensation to the plaintiff for destruction of the plaintiff's business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their subsidiaries or associates, if shown by the evidence; and the profits which the plaintiff would have gained by a con-

tinuation of its business relationship with the several corporations with whom it had established business relations, if any. But only such profits may be recovered as can be ascertained with reasonable certainty. The fact that such profits may be involved in some uncertainty and contingency and can be determined only approximately upon reasonable conjectures and probable estimates does not necessarily mean that they cannot be recovered at all. If it is certain that substantial damage has been caused by the acts of the defendants and the uncertainty is not whether there have been damages, but only an uncertainty as to their true amount, then the jury may not refuse all compensatory damages merely because of that uncertainty. The plaintiff has a right to prove the nature

page 2589 } of his relationship with the coal companies, the circumstances surrounding the acts of the defendants, and the proximate consequences naturally and directly traceable thereto. If and when that is done, it is for the jury to determine the amount of compensatory damages to be awarded the plaintiff. The fact that such compensatory damages cannot be computed with any exactness is not a sufficient reason for refusing to award any compensatory damages, provided there is a sufficient foundation for a rational conclusion.

(2) Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with a view to the enormity of the offense to punish the defendant and thus make an example of him so that others may be deterred from committing similar offenses. Punitive damages may be given in the discretion of the jury where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner, or maliciously and with a design of injuring plaintiff in its business, or where the wrongful act is accompanied with insult, indignity, oppression, or threats, or where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases, the jury may assess the damages at any sum which you may believe from all the evidence, in the exercise of sound discretion, the plaintiff ought to recover, not exceeding the

page 2590 } amount claimed.

If you should find that the plaintiff is entitled to both compensatory and punitive damages, you should find each class of damages separately; that is to say, you should award compensatory damages in one amount and punitive damages in another amount. Punitive damages need not necessarily bear any relation to the damages allowed by way

of compensation, but punitive damages must bear some relation to the injury and the cause thereof.

In order that the plaintiff may recover damages in this case, whether compensatory or punitive, or both, it is not necessary to prove the acts complained of were either expressly authorized or expressly ratified by those for whom Hart was acting if you believe from the evidence that the acts complained of were committed by Hart within the scope of his employment in the performance of a duty to his principals to organize the unorganized. If, in doing any acts which he was authorized to do, he did them in such a manner as to render him liable, his principals are likewise liable, although they did not expressly authorize the acts to be done in the manner in which they were done, and did not expressly ratify the manner in which the acts were done.

The jury is instructed that since the events complained of are alleged to have taken place in the State of Kentucky, the law of that state determines the substantive page 2591 } rights of the parties in this case.

The jury is *instruction* that the burden is upon the plaintiff to prove by a preponderance of the evidence all facts necessary to constitute a claim for damages against the defendants. And you may consider a fact established by the greater weight of the evidence as being proven by a preponderance of the evidence, but a greater number of witnesses for the proof of a fact does not necessarily constitute a preponderance of evidence.

The jury is instructed that the plaintiff's common laborers and carpenter helpers had the right, free from restraint or coercion by the plaintiff or its agents, to associate for self-organization; to designate collectively representatives of their own choosing; to negotiate the terms and conditions of their employment, all for the purpose of effectively promoting their own rights and welfare. Such employees, collectively or individually, had the right to strike, to engage in peaceful picketing, and to assemble peaceably.

In the exercise of the above rights such employees had the right to interfere with the plaintiff's business without being liable in damages for such interferences.

The above rights are not lost because others who are not employees of the plaintiff join with them in asserting the employees' rights.

page 2592 } Minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character.

The jury is instructed that in Kentucky the employees of the plaintiff, including common laborers and carpenter helpers, had the right to organize to promote their mutual advantage, to secure fair wages, to secure better working conditions, to secure better hours, to induce plaintiff to establish usages with respect to wages and working conditions which are fair, reasonable, and humane, and to achieve the fundamental right to contract collectively with the plaintiff, Laburnum Construction Corporation.

To accomplish these legitimate ends, employees of the plaintiff, including common laborers and carpenter helpers, may strike, may indulge in peaceful picketing, may use any peaceful means not partaking of fraud to induce others to become members; may acquaint the public with facts which it regards as unfair, publicize its cause, and use persuasive inducements to bring its own policies to triumph. When engaged in a lawful strike its members may join in a crowd to persuade other men who propose to work not to take their places. Its members have a lawful right to assemble, to address their fellowmen, and endeavor in peaceful, reasonable, and proper manner to persuade them regarding the merits of their cause and to enlist sympathy, support, and succor in the struggle for legitimate labor ends, and finally its members may assemble and agree to pursue, and pursue any legal means to gain their ends, that is, use persuasive powers in a peaceful way.

The jury is instructed that if you find from the evidence that the plaintiff's employees refused to work for it solely because of the existence of a peaceful picket line and that they would have worked if there had been no picket line, your verdict must be for the defendants.

The jury is instructed that under the law the plaintiff's common laborers and carpenter helpers had a right to organize for the purpose of bargaining collectively with the plaintiff. If you believe that the plaintiff restrained or coerced such employees in the exercise of those rights, then the plaintiff acted unlawfully.

The jury is instructed that a part of the plaintiff's claim for damages is based on the loss of future profits which it alleges it would have earned but for the wrongful acts of one or more of the defendants. In this connection you shall be governed by the following:

(a) No damages can be awarded against any defendant unless you first find as a fact from the evidence that the plaintiff is entitled to recover against that defendant.

(b) No damages can be awarded unless you page 2594 } also find that the damages were directly and proximately caused by the alleged wrongful acts of one or more of the defendants.

(c) The damages claimed by the plaintiff must be capable of being ascertained with reasonable certainty. Remote, speculative or contingent damages are not recoverable.

(d) The plaintiff has the burden of proving with reasonable certainty the profits that it claims as damages. If you cannot determine profits from the evidence with reasonable certainty, then you cannot award any damages based on the profits the plaintiff claims it would have earned.

(e) If you believe from the evidence that the profits, if any, of Virginia Mechanical Corporation should not be included in the profits, if any, of the plaintiff's then you must deduct such profits, if any, from the plaintiff's claim.

The jury is instructed that the plaintiff claims damages by reason of the alleged destruction of the business relationship which it had formed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies. You cannot allow this item of damages, unless you find as a fact from the evidence that such destruction of the business relationship occurred prior to November 16, 1949, or was caused by the wrongful conduct of one of the defendants which conduct took place prior to page 2595 } that date.

The jury is instructed that if you believe from the evidence in this case that none of the defendants, or any of their respective agents acting within the scope of their authority, have acted wantonly, recklessly, or oppressively, or with sufficient malice as implies a spirit of mischief or criminal indifference to civil obligations, you cannot award plaintiff any punitive damages in this case, and if you should find for the plaintiff, its recovery shall be limited to compensatory damages only.

The jury is instructed that if W. O. Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages can be awarded plaintiff against any of the defendants.

The jury is instructed that none of the defendants is legally responsible or liable to plaintiff for any fears of any of its employees which were generated by the alleged reputation for violence of Breathitt County, Kentucky.

The jury is instructed that any evidence introduced on behalf of plaintiff to the effect that any of the defendants has a

bad reputation for failing to abide by the law in Eastern Kentucky is not to be considered as evidence that the defendants committed the specific wrongful acts alleged by the plaintiff.

ARGUMENT OF GEO. E. ALLEN IN BEHALF OF THE PLAINTIFF.

Mr. Allen: Will Your Honor notify me when my time has expired.

May it please Your Honor and gentlemen of the jury: We are approaching the end of a long struggle which do doubt has taxed the capacities and the patience of all of us. The historians tell us that at the end of a struggle is peace. It may be so in this case. They tell us also that a struggle is a means to that end.

Indeed, gentlemen of the jury, the very life of the law itself is a struggle. Every legal right that we enjoy today, every fundamental principle upon which our American way of life is based, was wrung from those who denied it by a struggle, and sometimes a long struggle. A legal right, a fundamental principle, once gained, men have had to stand ready continually to defend it, else it would be lost to the benefit of society.

When an important right is challenged, somebody must of necessity rise up and assert the defense.

When Mr. Bryan went to Kentucky with contracts in his hands with those coal companies, with employees of his own choosing, he had a constitutional right to go there and to do business in that way, and when that important right was challenged, it was not only his duty to himself but his duty to society, to American civilization, to assert his right and defend it, and how magnificently he has done that in this case. How he has defended that right down to this good minute is worthy of the admiration of every patriotic citizen.

Gentlemen of the jury, the rights of the parties in this case are determined and may be determined by the decision of a few very simple question.

In the first place, did Hart and his men go to the job site in this case, as His Honor says in the instructions, with peaceful intentions? As my friend, Watkins, the Commonwealth's Attorney from Breathitt County says, did he get these men from homes which had Bibles and did he bring them there with Sunday school words on their lips to persuade, peacefully and in a Christian-like manner, these employees of Mr. Bryan to join his union for the betterment of their working conditions

and the increase of wages, or did he go there with these ruffians, this disorderly crowd of men and by threats, intimidation, force or threats of force, violence or coercion cause these men to leave their jobs and put them in such fear that they did not return? You are to decide what he went there for.

It is my purpose to point out to you a few things which I hope will help you to decide that question in our page 2598 } favor.

In the first place, His Honor says it is the duty of both employers and employees to negotiate. Collective bargaining is the rule, is the law. Did you hear of any negotiations on the part of this man Hart before he went there with that crowd of men? The only negotiations you hear of is that he called up Mr. Bryan on the 14th of July, 1949, and told him, "I don't care so much about the work you are about to complete, but you are not going to do any more work in Kentucky unless you work our men. This is United Mine Workers' territory."

Mr. Bryan asked him, "Don't do anything until I get out there." Mr. Bryan had a breakdown with his automobile and didn't get there until a few hours after Hart had made the raid. Who was it that failed to negotiate? Who was it that took the law in his own hands to begin with? Who was it that gave Mr. Bryan the ultimatum to start with: "This is United Mine Workers' territory. You have got to employ our men if you work out here." Mr. Bryan had a right to employ A. F. of L. men. He had a right to make a contract with them. He had a right to make contracts with the coal companies, and he had a constitutional right to go out there and get the benefit of those contracts, the profits that he might earn from the performance of those contracts.

Why, indeed, gentlemen of the jury, a contract page 2599 } is regarded with such sanctity in this country that it is in the Constitution of the United States that even a state can't impair the obligation of a contract, and yet these men, these defendants look upon a contract as a mere scrap of paper. "We don't care—" They didn't use that exact language, but the sum and substance of the testimony is, "That doesn't make any difference if you have employed A. F. of L. men. It doesn't make any difference about your contracts. This is United Mine Workers' Territory, and you have got to employ our men."

Do you believe the testimony that we adduced along that line?

Another thing to guide you in determining whether they went there with a peaceful intention and whether they exer-

cised their legal rights of peaceful persuasion. You remember the Hopewell incident. You remember that Mr. Bryan was working also A. F. of L. men in Hopewell on the jobs, and you remember that Mr. Fohl took that matter up with Mr. Bryan. You remember the conference that Mr. Bryan, Mr. Fohl, and Mr. Joinville had in Mr. Bryan's office. You remember that Mr. Fohl said he left without accomplishing anything, and the whole thing just withered away on the vine. Nobody knows exactly what took place between Mr. Fohl and Mr. Joinville except Mr. Fohl said that after that conversation with Mr. Joinville after they went out of Mr. Bryan's office, he never had any more contact with Mr. Bryan, he never followed it up.

When they found Mr. Bryan in Kentucky, can't you hear them saying under their breath, "We've got him now. He is in our territory. We couldn't do anything with him in Virginia. We have got him now. We won't let him do any work out here. We will kick him out of Kentucky."

Don't you know that was in their minds? Don't you know that is what they were doing?

I said there wasn't a particle of evidence to show that there was any complaint from a single employee of Mr. Bryan's, not a particle of evidence to show that any mention had been made of higher wages, different working conditions or anything of the kind. There had been no negotiations, no suggestion to it, or no requests.

And Hart gets this bunch of men. Why did he need all these men to help persuade? He said to make a show of strength. They say he was talking about a show of strength of the union. We say he was talking about a show of strength of force. Their own witnesses say there were not less than 25 or 30. Does it take all those men to go down there and engage in peaceful persuasion, peaceful picketing? Our men say there were many more. One of our men said he counted the men and he knows there were 47. He knows there were that many, and he knows there were more but he did not know how many more. So the evidence ranges from their witnesses there between 25 and 30, with our witnesses up to perhaps 100.

Take their own witnesses, between 20 and 30. What necessity was there for bringing all those men there if they were coming there for peaceful purposes? Our men tell you, one and all, witness after witness, that they came there with a show of force, threats of violence, using language too abusive for me to mention in this courtroom, language that people do not use in peaceful conversations, language which people do not use when they are resorting to persuasion in order to

carry their points. Several of their own witnesses on cross examination admitted that the men said they were scared. I have jotted the names down here. Several of them admitted that they were scared. A man named Jackson, put on by them, said that he had to join up with them to work. Hart himself admitted that he said he could get 500 men and bring them there if necessary, but he tells you that was just said jokingly. Hart himself admitted that there was some cussing there, but it was all just laughing and joking.

Grant Davis admitted that the men said they were afraid, afraid they would be shot and picked off the job, by men around in the hills. Bert Preston put on by them admitted that some of the men said the work was dangerous. This man Higgins—I believe he was the one who couldn't
 page 2602 } hear anything, and all he could do was read your lips—said that he had to join up in order to get work there. He admitted that much.

But the witness who comes along and paints the prettiest picture of the thing you ever saw and uses language the most expressive and the most characteristic and descriptive of the situation that the expert could use was the man, McClellan. He said all seemed scared, "Sh-h, sh-h! trouble, trouble!" That ominous language tells the tale, sh-h, sh-h, trouble, trouble. It was their witness who admitted that.

Earnest Howard said he signed up because he couldn't work without signing up.

My friend Watkins, this nice looking young lawyer from Breathitt County, Kentucky, who came here and told you that while Breathitt County had this reputation of being "Bloody Breathitt," it had lived the reputation down and it was one of the most peaceful counties in the State of Kentucky, that some lady from Richmond came out there and stayed and came back and changed the name and gave it "Beautiful Breathitt, Beautiful Breathitt."

I asked him, "Mr. Watkins, couldn't you have determined that by examining the criminal records of Breathitt County and seeing whether you have more criminal prosecutions and
 page 2603 } convictions there now than you did when it de- served this reputation?" He said "Yes." I said, "Did you do that before you came here?" "No." So you can just infer from that that if he had examined those records, they would have been evidence against him.

Another thing which you have a right to consider in determining the purpose for which Hart went there. You will remember that we called for the daily reports of Hart and Hunter. The evidence shows that Hart made a daily report.

I don't mean that he sent in the report every day, but at the end of a week he would report what he did every day during that week. And Hunter did the same thing. From that there were just dozens of reports that were made, but not a single solitary one that covers the period involved here, not a one. You read the other reports and you can see what they were doing at other times, and you will find that they say in those other reports that they closed down the job of Hamill at Ragland, Kentucky. You will find that they stated in one of those reports that on that job A. F. of L. labor was worked. They say in their reports that they closed that job down.

You will find that they closed down the Livingstone Construction Company at Toner, Kentucky, using their language, "job closed down." You will find that they closed down the job of Charles Brothers Lumber Company at Big Creek, Kentucky, and you will find that they also worked A. F. of L. labor there when that job was closed down. I

page 2604 } say they closed that job down. I am mistaken about that. They didn't actually close it down so far as this record shows, but the report says that they gave the president of the company a week to think it over and if he didn't sign up, "We intend to close the job down." That is exactly what that report shows.

One of the reports also shows that they closed down the job of Charles Brothers Lumber Company at Big Creek, Kentucky, because they refused to recognize the United Construction Workers, and the language is: "Job was shut down."

They gave us a little bit more in another place about the Hamill job. They said they had been trying to get Hamill to sign up for a long time, but they were never able to do it until a man, Fleming, a union representative, went there and whipped the bully on the job. Then they got the contract signed up. That is in their own report.

Gentlemen of the jury, if those reports are that bad about these other jobs, don't you know when they refused to produce the reports covering this period, that it covered all the activities that they engaged in and that if those activities constituted evidence of peaceful negotiations, peaceful persuasion, peaceful picketing, they would be here piled that high if they had that many. Oh, yes, they will answer and say we destroyed those reports in the usual course of business, and

the record shows that they keep them a minimum
page 2605 } of three months. Some of them say they keep them six months, but in another place they say they keep them a minimum of three months. But you will re-

member that when Mr. Bryan went into Mr. Hunter's office, I believe it was a day or two after this July 26, 1949, a dispute arose as to the exact day or time that Hart went to this job site, and Mr. Hunter says, "I can settle it by looking at these reports," and he looked at the reports and Mr. Bryan saw the reports. He didn't see them well enough and close enough to read them, but he saw the reports and he saw Hunter look at them. Hunter was the regional director and was the boss that was immediately over Hart.

Gentlemen of the jury, I don't believe it is necessary for me to stress any further the evidence on the issue as to whether or not Hart went there with a disorderly crowd and exceeded the limits of peaceful picketing and peaceful persuasion as His Honor has described to you in the instructions.

The next question is, are these defendants liable for what Hart did? I believe this is Exhibit 63. It shows you District 50. You can see Washington and you can see the lines going all out from Washington. It says:

"District 50 members organized in the nation. The United Mine Workers of America has its national headquarters in the Nation's Capital, Washington, D. C. page 2606 } Through its full time legislative representatives the United Mine Workers of America is constantly in touch with matters before Congress. The United Mine Workers of America has 31 districts offices, and District 50 has 33 regional offices with numerous sub-regional offices. These offices have direct contact with legislatures in every state. An experienced staff of field organizers is ready at all times to assist members in negotiating and organizing. Organized on a nation-wide basis, District 50 has brought unequalled benefits to thousands of its members. District 50 will continue to organize the unorganized. District 50 is also doing everything possible to aid the war program of our government.

"The above map shows the great expansion of District 50 United Mine Workers of America, and how it has been able to bring economic justice to thousands of workers in every section of the country. Starting from Washington, D. C., the organizational program of District 50 extends into practically every state in the country and has welded together many of the hard-fought gains won by labor. Many unions much older than District 50 have never reached in their greatest days the success that has come to District 50 under the able leadership of its district officers and international president, John L. Lewis."

Remember, the record shows that Mr. John L. Lewis appoints the top leaders of District 50 subject to the approval of the International Executive Board of the United Mine Workers.

"To make such an organization possible, other districts of the United Mine Workers of America cooperate, and today after six years of fighting side by side with the men who mine the nation's coal, District 50 is one of the most aggressive units of the world's greatest labor organizations. The map also illustrates the great responsibility of District officers O. E. Gassaway, President, Miss Kathryn Lewis, Secretary-Treasurer, Charles S. Fell, International Board Member, and Michael F. Widman, Jr., organizational director," all of whom according to the record were appointed by Mr. Lewis, President of the United Mine Workers, subject to the approval of the International Executive Board.

"District 50 officers are in constant contact with all regional and subregional offices, insuring members of District 50 that their rights as union members and Americans are fully protected. District 50 has a competent staff of field representatives fully capable of organizing and negotiating contracts. These representatives are available for all locals any time any local is in need of assistance. District 50 has a capable staff of lawyers to represent its miners in every state whether they be involved in litigation before the War Labor Board, the National Labor Relations Board, Workmen's Compensation Acts, and so forth. Chief Counsel for District 50 is Attorney Alfred Cannon.

"Every dot on the map indicating regional offices or subregional offices means that Uncle Sam is collecting funds every day through war bond purchases of District 50 members. In practically every section of the United States locals of District 50 have taken a portion of their wages and invested them in the future of America. No union in the country can equal the progress or the expansion program that always has been the aim of the United Mine Workers of America. District 50 has penetrated into areas that other forces of organized labor avoided for years because of the strangle-hold giant corporations had on communities. In the deep South, in the North, on the West Coast, in the West, and in the East, District 50 has marched to victory through the backing of John L. Lewis and the United Mine Workers of America. The benefits won by District 50 are now being given to thousands of unorganized workers in various sections of the country.

"Members of District 50 are urged to place a copy of this map in a conspicuous place in their meeting halls. The map

shows that the members of District 50 from coast to coast have brothers and sisters in the labor movement in all sections of the country. The map also shows that a great deal of organizing is needed to assist the unorganized.

page 2609 } District 50 members can do their part by helping their field representatives organize plants in their own home communities that have not been organized under the banner of the United Mine Workers of America."

Organizing the unorganized everywhere under the banner of the United Mine Workers of America.

So says their constitution, gentlemen of the jury. Section 20 of the constitution of the United Mine Workers of America reads:

"District 50 United Mine Workers of America, subject to the jurisdiction and regulation of the international executive Board, is hereby created and set up under authority of the international union and may adopt by-laws and rules non inconsistent with the constitution."

And the rules of District 50 provides: "This organization shall be known as District 50, United Mine Workers of America, and shall work under and be subject to the constitution of the international union as provided in Article 20."

You see how it couples up.

Then the rules of District 50 say: "The administrative officers, operating under the authority of Article 20—"of the Mine Workers constitution—"shall have general and complete supervision over and administration of the affairs of District 50."

page 2610 } Section 1 of Article 4 of the rules of the United Construction Workers provides" "The administrative officers, operating under the authority of certificate of affiliation granted by the United Mine Workers of America, shall be composed of a national director—" that the national director is A. D. Lewis, the brother of John L. Lewis, appointed by John L. Lewis, subject to the approval of the International Executive Board "—who shall have general supervision over the organizational, financial, legislative and internal affairs of the organization, and a national controller who shall keep the books and records and act as custodian of the funds and property of the national organization."

That national controller is appointed by Mr. John L. Lewis, subject to the approval of the International Executive Board. "The national director"—again A. D. Lewis—"shall have the authority to interpret the rules and he shall render a de-

cision on all points of law or grievances submitted to him by local unions, and his decisions, and interpretations, shall be final unless changed by the International Board."

I will have to hurry along. I would like to read to you some more of those rules and regulations and provisions of the constitution, but the sum and substance of it all is that the organizational affairs and all the principal affairs of

District 50 are managed by officers appointed
page 2611 } by Mr. Lewis, subject to the approval of the

International Executive Board. The evidence shows that the jurisdiction, so far as area is concerned, of District 50 is co-extensive geographically and jurisdictionally with that of the United Mine Workers itself. No other district of the United Mine Workers is like it. The other districts are sometimes a part of a state, sometimes a part of several states. I believe there are thirty-one other districts.

The evidence shows that even as to those districts Mr. Lewis revokes the charter at will and creates a provisional district, so to speak. The evidence shows that District 50 was createe as a provisional district, which means that it is governed, managed by officers appointed by Mr. Lewis subject to the approval of the International Executive Board, except no doubt they have some local elections and things of that kind and local affairs that don't amount to anything. They may have the right to attend to them.

Gentlemen of the jury, his Honor has told you in those instructions that if the United Mine Workers were using District 50 as an agent or a means or an instrumentality of organizing the unorganized in occupations other than mining, and that William O. Hart was an agent of District 50 and an agent of United Construction Workers, which is admitted,

and that William O. Hart went there and ran our
page 2612 } people off the job, as we say he did, and if Mr.

Hart then was acting in pursuance of his duties in that respect, then all three of these defendants are liable, and if they did those acts in the manner in which they contend they did them, they are liable not only for compensatory damages, but for punitive damages, as to which I shall say more presently.

Not only is that true, but this evidence shows—and it came out of the mouth of Dixon when he was on the witness stand, the international representatives of the A. F. of L. He says it is the policy of the United Mine Workers, United Construction Workers,—of these defendants, I might say, to shorten it—is to raid jobs where workers are A. F. of L. men and by raiding he meant to run them off, not go there by peaceful persuasion, with Bibles in their hands and Sunday school words

on their lips, and say, "Our union is better than this other one. Now give me a chance to explain it to you. Come on with us." He says it is their policy to run them off.

Some witnesses said that they had a reputation in Eastern Kentucky of running them off. Under His Honor's instruction you can't consider that in determining whether Hart committed the acts we claim he did, but you can consider the reputation in determining whether it got back to the United Mine Workers and whether they knew anything about it or not.

page 2613 } Tom Raney right in the midst of it all, right there with an office in the midst of it all, right with Hunter, right with Hart, in the midst of all of that furor, never heard anything about it in his life. He didn't even know that Mr. Bryan was doing construction work in Eastern Kentucky, and he had been there about two years. He didn't even know it. I wonder what he was employed for. I wonder what his business was. Was he employed to do things in the interest of the unions and to shut his ears and eyes to things he didn't like so he could come here and say that although he was a member of the International Board and was there to assist Hunter and there to assist Hart and there to assist anybody else who needed assisting, if any of them did something they shouldn't do in the performance of their duty, he mustn't know anything about it and he must come here and say "I never heard of it." That is Raney.

Don't you know it wasn't possible for a man like Raney to live in that area and not know it? In Biblical language, this thing wasn't done in a corner. It was done publicly, notoriously, high-handedly, and he never heard of it, never heard of it! I don't know what salary he drew. I don't know whether the record shows it or not, and since I don't remember whether it shows his salary I will not mention it, but I say if they paid him any salary they paid him for doing nothing.

page 2614 } Gentlemen of the jury, all these reports that we have been talking about, dozens of them in the record, all show that they went to the headquarters in Washington. They went right to the desk of A. D. Lewis, National Director of the United Construction Workers, Chairman of the Organizing Committee of District 50, and mind you, the evidence in this case shows that the United Construction Workers didn't have any organizing committee. So the only organizational work that was done there is bound to have been done by the organizing committee of District 50 and Mr. A. D. Lewis, an appointee of Mr. John L. Lewis, was Chairman of that organizing committee, and those reports

went to his desk. The things that I called your attention to a moment ago were lying right on his desk, and he must have read them if we assume that he performed his duty.

There is one other remarkable thing about this case which proves in my mind conclusively that Hart was there in the performance of his duty. In our practice when a complaint is filed against a defendant, the defendants are required to file their defenses so we may know what to meet. So they come in here and file defenses. United Construction Workers don't file a separate defense, District 50 a separate defense, and United Mine Workers a separate defense. Oh, no.

They all join in and file the same defense and page 2615 } they all signed the same defense. I want to show you some things that they say.

Sixth Defense: "The plaintiff is not entitled to any punitive damages for the reason that under the law of Kentucky no defendant and no person for whose conduct the defendant or any of them are legally responsible has been guilty of any wantonness, oppressiveness, recklessness or of such malice as implies a spirit of mischief or gross indifference to the welfare or civil rights of others."

The eight defense: "The plaintiff's injuries and damages, if any, are not actionable"—that means you can't sue for them—"for the reason that they are the result of the exercise by these defendants"—all three of them because they all signed this paper—"and the persons for whom they are legally responsible of their legal rights under the First Amendment to the Constitution of the United States."

So they come here and say over their own signature that we can't sue for it because our damages result from the exercise by these defendants and persons for whom these defendants are responsible of rights under the First Amendment of the Constitution.

The First Amendment to the Constitution of course provides that no state shall establish any religion and then it provides that everybody shall have the right to page 2616 } exercise free speech and assemble peaceably and that sort of thing. That is what they are talking about, but they are putting them there as persons for whom they are responsible and they say "We are not responsible for them because they didn't exceed those rights under the constitution."

Gentlemen of the jury, I come to damages. His Honor has told you that there are two kinds of damages which may be recovered in cases of this kind. One is compensatory dam-

ages, and the other is punitive damages. Then His Honor has defined compensatory damages and he has defined punitive damages.

Compensatory damages, His Honor tells you, is what you might say is the measure of the loss sustained, the loss of profits, the loss of the value of the business connection with those coal companies, and losses of that kind, loss to business reputation, hurting this man's reputation in the business world by having contracts cancelled and being run out of Kentucky, and that sort of thing.

Then there is another class of damages which His Honor says we may recover in your discretion, and that is punitive damages. Punitive damages are not given, his Honor tells you, alone to compensate the plaintiff, but they are given principally, in view of the enormity of the offense committed, for the purpose of punishing the defendants, to deter them and others from the commission of similar offenses; page 2617 } and His Honor tells you if you believe from the evidence that Hart went there and acted as we say he did, that he didn't confine himself to peaceful picketing and peaceful persuasion, but used threats, intimidation, violence, or coercion, and as a result of those acts our people were scared away, so to speak, and failed to return to work, then you have a right to assess punitive damages, to punish these people, to punish them for doing such a thing. So far as this evidence shows, they weren't punished in Kentucky and they can't be punished here except through punitive damages in this case.

When you come to assess punitive damages, gentlemen of the jury, you have to consider this: What would be punishment for one person in a lowly walk of life, of small means, wouldn't amount to anything with persons in a higher walk of life, walking in larger circles with more influence.

Mr. Mullen: I hate to interrupt, but that is an improper argument under the instructions. It has been refused.

The Court: What about that, Mr. Allen?

Mr. Robertson: We think it is proper argument, Your Honor, but we will forego it.

Mr. Allen: I am not going to stress that. I will keep myself within the limits of the instruction.
page 2618 } The Court: Disregard the last remark, gentlemen.

Mr. Allen: The instruction leaves it up to the discretion of the jury.

The Court: That is correct.

Mr. Allen: I hadn't come to that part. These gentlemen wouldn't let me finish. I am trying to be as fair as I can.

Gentlemen of the jury, in other words, you can allow no punitive damages against one defendant and punitive damages against another defendant, or you can allow punitive damages against all the defendants. All of that is within your discretion, and I say that if you believe from the evidence that District 50 was being used as an agency or instrumentality of the United Mine Workers to carry out their policy of organizing workers in other fields than in the mine fields, then you have a right in your discretion under His Honor's instruction to give us punitive damages against the United Mine Workers.

The Court: Three more minutes, Mr. Allen.

Mr. Allen: Now, gentlemen of the jury, you have listened attentively, and I am not going to consume the three minutes. Either my friend, Mr. Mullen, or Colonel Harris, or both, will follow me in due course. We all know Mr. Mullen. We love him. He is one of us. We still love him, if he is on the wrong side. Colonel Harris comes to us a leading page 2619 } lawyer from the great State of Alabama. I know you will give him respectful attention, and I know he is going to make you a good speech, but I don't believe even Colonel Harris, with his oratory and persuasion can convince you or any other fair-minded jury that what his clients have done to us is exactly right.

I thank you.

The Court: The Court will recess for five minutes.

(Brief recess.)

The Court: Colonel Harris.

ARGUMENT OF CRAMPTON HARRIS IN BEHALF OF THE DEFENDANTS.

Colonel Harris: If the Court pleases, and gentlemen of the jury: I want to say first that I appreciate the nice words that Mr. Allen said about me. I think the compliments of such an able trial lawyer are something that I shall remember. However, it shows how difficult it is for one person to read the mind of another person. I do not intend to indulge in oratory. It does not seem to me to be either the time or the place to deliver an oratorical address, if I were capable of delivering such an address. It seems to me that the problem confronting the jury and the problem confronting me is to give this case a calm, a careful, and a reasonable consideration.

In the first place, when any case comes up, the first question

that you want to know is who is suing whom. page 2620 } I want to make it clear in the beginning—and I hope that you gentlemen will remember it all the rest of the trial—the defendants named in this case are three. They are the International Union the United Mine Workers of America, they are District 50 of the United Mine Workers of America, and they are the United Construction Workers associated with the United Mine Workers of America. Those are the three defendants. Mr. John L. Lewis is not a defendant in the case. They have not sued Mr. John L. Lewis. We are not concerned with the internal management of the United Mine Workers.

Mr. Allen made one inaccurate statement. If you gentlemen will look at the constitution of the International Union of the United Mine Workers you will see that Mr. Lewis is elected by the rank and file of the membership, and if you will read it you will see that such precautions you have never seen exceeded, in my judgment, in your life, such precautions to see to it that the rank and file get to vote according to the way they please and that their vote is counted by men who are chosen for their specific purpose.

We are not here, as I understand the law of Virginia, to try some other lawsuit. We are not here to go into any past history unless that past history throws light on the accusations made against us.

They charge that we, the three unions, inter- page 26621 } fered wrongfully and unlawfully with the business of the Laburnum Construction Corporation. We deny that we interfered wrongfully and unlawfully with their business. You will find in the red folder when you go out, if you care to look at our defenses, that although the Laburnum Construction took page after page after page to state what it was claiming against us, we put our defenses, except the technical denial that we had to put in line by line, we put in our defenses very shortly and very, very simply. We said first of all that we were not guilty. That is the denial required. Then we said that whatever was done was done in the exercise of a lawful strike. We also said that if the plaintiff seeks to recover damages, his damages that he seeks from this jury do not meet the requirements of the law. We put in a defense that the damages he claims are contingent, remote, speculative, and uncertain.

Where does our issue come in this case? This is a case in which the witnesses on one side swear one way and the witnesses on the defendants side swear another way. Under those circumstances it is the province of you gentlemen—and no lawyer and no person can take that function away from

you—it is the province of you gentlemen to pass on the credibility of witnesses and see where the truth actually lies in the case. What did happen?

In the first place, to summarize the things that page 2622 } they charge us with out there on the morning of July 26. First of all, I think that we should all bear in mind that this is something that happened in the State of Kentucky. It did not happen in Virginia. Under those circumstances, as the judge has instructed you, the law of Virginia is simple and clear and to this effect: "Since the events complained of are alleged to have taken place in the state of Kentucky, the law of that state determines the substantive rights of the parties in this case."

Any idea or any experience that you have had with Virginia law is supplanted by the instructions that His Honor has given you with reference to the law in this case, the law that is determining whether or not we were guilty of a wrongful and unlawful act on the morning or the noon hour of July 26, 1949.

As I conceive it, when you come to examine the credibility of the witnesses, one of the reasons we have juries in America is that you gentlemen may bring in to this witness stand all of the knowledge and practical experience that you have gained in the management of your own affairs. You are to say whether a story told you is so remarkable that it is necessarily exaggerated or you are to say whether that story is accurate and true. When things are *to* remarkable to bear belief, that fact alone is impressive on the processes of human reasoning, and I call your attention to the re- page 2623 } markable situation in this case.

What do they claim on that noonday of July 26 that the men with Hart did? They didn't leave out much. I will put them in the order that I recall them. They said, first, that they were taken by the seat of the pants and thrown off. That was one thing they were going to do to them. They said, second, they were going to kick them off, in vulgar language. That was the second thing. They said, thirdly, that they indicated they were going to slash them with knives. They said, fourthly, that they indicated they had hidden pistols. My recollection is that Mr. Bryan said none of his men saw any pistols. Then they said, as number five, I believe, that they were going to drown them, that they were going to throw them in a pond; and then finally, that they were going to have men in an ambushade back in the hills with high-powered rifles and shoot them off.

Have you ever heard of a battle in which not a single shot was fired? Isn't it perfectly remarkable that out there in

Kentucky—and necessarily the life in Kentucky and the habits of the people in the mountains of Kentucky is a different life and their habits are different from the way of living of you gentlemen here in the city of Richmond. The habit of life of those people out there, according to the evidence that they put in, was such that those men were blood-thirsty. They go further. At page 624 of the record Mr. page 2624 } Bryan makes the statement of what he thinks.

Mr. Bryan makes the statement of what he thinks of those people out in Kentucky. Here is a question:

“Question: Bloody Harlem. Doesn’t that go back to the ancient feud days when they got those names?”

Mr. Bryan goes out there with Laburnum in this kind of community, and here is what he says about it: “It is not so ancient. Those people out there have a reputation of being ready to shoot you just as soon as they will look at you.”

Isn’t that necessarily slightly exaggerated? Have you run across any people in your experience that are willing to shoot a man just as soon as they would take a look at him? But that is what Mr. Bryan wants this jury to believe happened and was the kind of people that they had out in Kentucky.

There was a man named Freeman who testified. This is the most remarkable condemnation of a whole people that I have ever run across. I seem to recall that in English history a great orator got up and told them they couldn’t indict a whole people, but notice what Mr. Freeman, one of their witnesses, said at page 786:

“Question: This terrible reputation that Breathitt County has—the people in Breathitt County had that reputation long before July, 1949, didn’t they?

“Answer: Yes, it dates back as far as 1900. page 2625 } We have a statute of a Governor standing in front of the Capital now, from some of their outlaw activities up in that section of the country.”

The Mine Workers weren’t out there. The Construction Workers weren’t involved.

“Question: That wasn’t a United Construction Workers fight?”

And here is what one of their main witnesses says about everybody out in Kentucky, in Breathitt County and the adjoining counties.

"It goes to prove that they are not law abiding citizens."

Do you believe that that man has come in here and given an accurate picture that you are entitled to have of those people out there? If they were as bloodthirsty as the gentlemen on the other side would have you believe, isn't it the most remarkable bloodless experience that you have ever heard portrayed? When you come to look at what happened out there on July 26, there is not a man who was shot, there is not a man that had a pistol drawn on him, there is not a man that had a knife drawn on him. All they said was that they were whittling with a knife. There was not a man that was kicked. There was not a man who was thrown in a pond. There was nobody taken by the seat of the pants.

They said, "Well, we will get around all that. page 2626 } We will go out and prove that they did other things in times past." Well, let's listen to those other things a minute. Have they shown that anybody connected with the United Construction Workers ever shot anybody in Kentucky, that they ever ambuscaded anybody in Kentucky, that they ever threw anybody in Kentucky in a pond? They talk about them careering over Eastern Kentucky, and the Court has charged you that a matter of reputation is not proof of the act that they accuse them of doing on July 26. You will find that is one of the charges that the Court has given you.

With all that time, with all that area, if the United Construction Workers were violent and bloodthirsty men, isn't it remarkable that they didn't bring a man in here who would testify that they had beaten him, that they had mistreated him, that they had done any of the things that they accused the construction workers of doing on that occasion?

The only thing that they have got that I can recall that in any way deals with violence on any previous occasion is where a bully was whipped. I got the idea from that language that an individual and a bully got in a fight. My idea of a bully is a man who seeks a fight, who seeks to trespass upon the rights of others. That is what being a bully means. That fight with a bully is the only specific act that they have found in all their searching in the records of the East- page 2627 } ern part of Kentucky.

They had witnesses who said they closed down the job, but closing down a job is not running people off of a job. That is what a strike means, to close down a job. The law of Kentucky say we had a right to strike. There isn't any doubt about that. The Court has so instructed you.

Under the law of Kentucky we have another right that

some states don't allow. In Kentucky you can form a crowd, and it is not a violation of law for a crowd to form. Some states hold that a crowd is an unlawful thing, but in Kentucky the statute that is quoted to you expressly says that a crowd can form in a labor dispute.

And another thing, out in Kentucky all the men who are engaged in a strike do not have to be employees of Laburnum Construction Company. In other words, the men engaged in picketing can be strangers so far as Laburnum Construction Corporation is concerned. They had those rights. Those rights are absolutely undisputed.

But they come in and say "You forfeited those rights by being guilty of violence, of threats." We deny that we were guilty of violence.

We ask you to bear in mind that this testimony goes on up until August 7, 1949, and the evidence shows that they had a picket line out there for days afterwards, after the 26th.

During that period no living human being suffered any act of violence.

They say "Well, when they were there that day they got men to sign who didn't want to sign." I call your attention to the fact that we have a most remarkable situation there. Two of their witnesses said they knew those men that came over there with Hart. Those men were not a bunch of hoodlums. They were people that were working for Codell, for Allen-Codell, and for Codell-Faulconer. They were people who lived around in that community. Two of their witnesses say they knew them. Isn't it strange, with these men working on the job, these A. F. of L. men, from the previous November until up in July, and they come here to help you gentlemen find the truth, and not a one of them tells you the name of any man that signed a card under compulsion? I mean by that, they complained physical violence where they said one man was on one side and one on another, and one behind him. Weren't you entitled, if that happened, to have them name the man that that happened to? Weren't you entitled to look at that man and see whether or not he was giving you an accurate picture?

No, gentlemen, I submit to you that this case is in many particulars a puffed up case. It is not a complicated case. Although you have been tied up on it a long time, if you go back you will recall that we put on all our evidence in about two and one-half days. When you come to decide the issues in this case, they are not complicated issues.

First of all, did we commit those acts of violence? Did we frighten those people into leaving Laburnum's job? They

have to prove that by a preponderance of the evidence before you ever go any further. If they fall down on that, then that is the end of this case of theirs.

There is something else that is in this case. When anybody claims that a defendant has done them a legal wrong, you have to show two things. You have to show that the legal wrong—this is taken from one of their instructions—was the proximate cause of the damage to the plaintiff. It has to be the proximate cause of damages to the plaintiff. If something else caused the damage to the plaintiff, then even though a defendant had at one time been guilty of a legal wrong, the defendant would not be liable for any of the consequences caused by something else.

I don't intend to argue the remarkable happenings on August first, 1949. Mr. Mullen will argue to you, in the division we have made of this case, that remarkable situation that is in the case from August 1, 1949, but I say, leaving that to Mr. Mullen, there is still something else in this case that shows that no threats or violence or mistreatment of any sort caused those carpenters to quit work. Why do I say that? Because

Bert Preston in the toolhouse, told W. O. Hart pag 2630 } "If you don't put up a picket line, we will surely as hell work. But if you do put up a picket line, we won't work." He didn't stand up to the word "legal," but apparently the word "legal" was used in that discussion, a legal pickett line. And Hart asked him if he put a man down here and let him stand, and he said, "No, that isn't what has to be done. You have to have a sign." Right then and there Mr. Hart made a sign and put it up to meet the suggestion and statement of Bert Preston, the bushiness agent of this A. F. of L. local.

What else do we find about those picket signs? Mr. Bryan evidently thought the picket signs were the thing that were causing him trouble out there because Mr. Bryan, when he first got there, was handed a picket sign that Mr. Ragan had taken. Then Mr. Bryan himself takes up two picket signs on the 27th. If this was a violent and bloodthirsty group of men, can you imagine any greater affront to men who have been told to put up a picket line than to have somebody come and grab his picket sign and throw it over the hill or to throw it into the bushes, and then to take the other two and go up in front of some of the men and trample on it? Yet Mr. Brayan, doing that where these men could see him, never suffered any injury whatsoever.

I say that those men out there have given you gentlemen an exaggerated picture of what went on. I say that those

Kentuckians are not all scrappers on our side page 2631 } and all timid men on the other. You know that.

You have see too much of life to know that men can escape their own blood. In the animal world, do you believe that any pit bulldog is going to let anybody else chase him away? Do you believe that game roosters start fleeing en masse? Do you believe that a bunch of Kentuckians are all scared and are going to let somebody come and take their jobs away from them?

Let me ask you something. If the United Construction Workers had the reputation that they have tried to fasten upon us, that reputation was known to these carpenters when they met and knew that the United Construction Workers were coming. If those men who were working, those carpenters, were frightened, if the Construction Workers had that sort of reputation, then those carpenters wouldn't have gone to work on Monday morning, and they wouldn't have gone to work Tuesday. They would have said, "Hub-oh, these wild killers, these men are coming in here that are violent and bloodthirsty."

No, those men were brave enough to go out to the job when they knew that the Construction Workers were coming, and they quit because a picket sign was put up. They would never persuade me that fear was in their minds and in their hearts.

I don't want to attempt to quote what has been said about the picket line. Let us find the exact words.

If the court please, I only want to speak 35 page 2632 } minutes before I begin to make my conclusion. How long have I been talking?

The Court: Your 40 minutes will be up at a quarter past 12

Colonel Harris: This is the stenographic report, and I assume that the Court Reporter gets it true. You gentlemen don't know me, so I want as much as I can to avoid any question of your having to size me up in order to size up what happened in the case. Therefore, I will take the unusual procedure of reading to you again. At page 996 they are talking about the toolhouse.

"What was said about a picket sign or a picket line there in the toolhouse?

"Answer: The only thing—he told him the only thing we would possibly recognize would be a legal picket line, according to the laws of the Brotherhood.

"Question: He used the word 'legal', and 'according to the laws of the Brotherhood'?

“Answer: The law of the picket line, that is.”

Mr. Robertson: What witness is that?

Colonel Harris: Page 996. I haven't looked back. Chester Trimble.

“Question: You said just a minute ago—”

Here is what he is telling that Bert Preston told him.

page 2633 } “Answer: Not just a man standing up there,
but one stuck in the ground.

“Question: You said a moment ago that he said ‘one that was legal according to the laws of the union,’ didn't you?

“Answer: Of the union, all unions, that is right.

“Question: You heard Bert Preston say that in the school-house?

“Answer: In words to that effect, I sure did. I don't know whether he worded it just like that but he meant—”

Get this. Does this look like they are frightened to death?

“—but he meant that would be the only possible way we could quit.”

He tells them how to put up a picket sign. He tells them what he expects. He tells them that he will honor it, and they follow his direction and nobody was hurt on the picket line thereafter, although they came along and took three more, I believe, of their picket signs.

That isn't the only thing that is said. There is another witness—this is on page 1011 and 1012, and this is Paris Trimble, another one of your witnesses.

“Question: When you went in the toolhouse I will ask you if this did not happen: Hart said to Bert: and
page 2634 } by Bert I mean Bert Preston, ‘you will not have
any more work,’ and Bert said”—

Is this a coward talking?

“—‘We will sure as hell work if you don't put up a picket.’”

Our people put up a picket, and the A. F. of L. carpenters recognized it.

In one place in the evidence they say that of course the men recognized a picket line. Question 18 on page 1065:

"Did I understand you to say that Mr. Preston made the statement that if they put up a picket line you wouldn't walk across it?

"Answer: Mr. Preston told them men there in the shop that we couldn't stop just on their say-so, but if they put up a picket line"—notice his language—"but if they put up a picket line, of course we couldn't cross the picket line."

That is their statement.

The interest of a witness is something that you have to determine, and these A. F. of L. witnesses who came here you have seen for yourselves. There is competition between the A. F. of L. and the UCW. I never have understood that raid meant to go out with force and violence, but it means to get the men to join their union, and that is what they were going to do.

page 2635 } In this case the judge has instructed you gentlemen that in Kentucky those carpenters and laborers had a right to organize.

On the 14th day of July, when Mr. Hart called Mr. Hamilton Bryan, Mr. Bryan asked him not to do anything, but what did he do immediately? He grabbed his phone and telephoned out to Kentucky and got his superintendent and said, "Get busy and get the carpenters helpers and common laborers in the A. F. of L."

Those men had been working out there since the previous November. They hadn't tried to organize them in the A. F. of L. Mr. Bryan himself said, "I believe at page 623 of the testimony, that the contract which he claimed to have—I don't think he used the word "claimed"—the contract which he had with the A. F. of L. did not cover carpenters helpers and common laborers.

It somewhat looks to me—and I mention it for you to consider—it somewhat looks to me as if Mr. Bryan on that occasion and all along was somewhat in the attitude of hunting a lawsuit. He made this remarkable statement: "I spent most of my time writing down what happened." He doesn't tell you that that was just writing a diary.

Then on the fifth day of August he goes over to see Hunter and he spends from four o'clock in the afternoon until about eight or eight-thirty at night talking to Hunter, page 2636 } and Hunter argues with him about the advantages of the UCW, and Mr. Bryan swears that he was taking notes all that time, and he says that "Mr. Hunter didn't know whether I was going to negotiate or whether I was going to sue him, and if I sued him, how, when, and where I would do it."

I say another thing indicates there was no violence out there. On Saturday after the 26th Mr. Bryan went to Louisville, Kentucky to see his lawyer, and he spends a great deal of time in a law office. I don't know who those lawyers are. He didn't tell us. He doesn't tell us what he told those lawyers. All he tells us is that those lawyers told him he couldn't get police protection. I submit that if he had been able to report to those men that there was any violence or any danger they would have been able to get police protection. This sergeant of police who comes up here—Mr. Bryan is under the impression that the man was shot in the foot or the leg, and you saw the place where the bullet went in somewhere about there (indicating). That man on direct examination said Bryant didn't complain that there was any violence. On cross examination he said he didn't know whether he did or not, but I submit that if Bryan had reported to him the situation that these A. F. of L. witnesses come in now and tell you, that sergeant wouldn't stay away from there.

The Court: Your time is up, Colonel, unless you want to continue.

page 2637 } Colonel Harris: No, I do not. I want to see that Mr. Mullen has all the time possible for his presentation.

The Court: You asked me to stop you.

Colonel Harris: Thank you very much. Thank you, gentlemen.

The Court: Gentlemen, the court will recess for five minutes.

(Brief recess.)

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page 2647 } AFTERNOON SESSION.

2:00 p. m.

(The following procedures were had in Chambers:)

Mr. Robertson: If Your Honor please, before lunch you stated to Mr. Mullen and me that one of the jurors had asked what the tax situation would be upon any recovery that might be allowed here, and six of the jurors had wanted that information all together. I STATED THAT I did not know what the law *as* and would like to find out. I asked Mr. Graves, the tax expert from our office, to look into it, and he says Mr. Mullen is right, as you always are, Mr. Mullen—

Mr. Mullen: Thank you very much.

Mr. Robertson: —that compensatory damages are taxable and punitive damages are not taxable. I don't think that that question can be answered unless both sides agree to it. We are willing to have it either answered or not answered, whichever way the defendants prefer.

Colonel Harris: I say no.

Mr. Mullen: I don't see how it comes in the case. Of course it is up to the discretion of the Judge entirely.

It could be prejudicial in giving punitive damages and it could be prejudicial in giving greater compensatory damages in order that the plaintiff would get more out of it, taking into consideration that part of it would go to Uncle Sam.

Mr. Fred G. Pollard: If it is explained that page 2648 } compensatory damages are taxable, it should certainly be explained to the jury that any profits he might have had would also have been taxable equally. So as to compensatory damages it doesn't make any difference.

Colonel Harris: It occurs to me that it injects a highly prejudicial element into the case. I have never run across a case in which the disposition that the plaintiff would make with any recovery after he got it becomes of any material importance in the case. It isn't what he is going to do with the money afterwards. It is whether he is entitled to it now.

Mr. Mullen: You have an expert on the jury, Goldman, who writes these tax letters.

The Court: Would it then be your suggestion that I just not say anything about it?

Colonel Harris: That is right.

The Court: That is agreeable with you gentlemen?

Mr. Robertson: Yes.

The Court: All right.

Suppose this juror should ask me the question, I will tell him that I don't think I should answer it. Is that satisfactory?

Mr. Robertson: Yes.

Colonel Harris: Yes.

Mr. Robertson: That that is not a proper page 2649 } question in this case.

The Court: That it is no matter of their concern or something of that sort.

Colonel Harris: That is right.

(The following proceedings were had in open Court in the presence of the jury:)

The Court: Mr. Mullen.

ARGUMENT OF JAMES MULLEN IN BEHALF OF THE DEFENDANTS.

Mr. Mullen: If Your Honor please and gentlemen of the jury: I deeply appreciate the patience and attention that you have given to me and my associates in presenting this case from our side. You have had a hard job. You have been take away from your business. But that is one of the things that make our American way of life that we are so anxious to defend against our many enemies. In serving on the jury you are helping to maintain that American way of life.

I am much obliged to my friend, Mr. Allen, for the testimonial he gave you as to the affection in which I am held. I hope it is true, and I hope that during the 51 years I have been practicing at this Bar I have so conducted myself as to deserve it. I may say in return that I have the highest regard for all the counsel on the other side. I have known them, known them for years, and I have nothing but
page 2650 } the highest regard for them.

Mr. Allen said that I was on the wrong side. Well, I think it is known to you that I am what is known as the businessman's lawyer, or if you want to put it, a corporation lawyer, although that sometimes is used in derogation. However, I don't think that I am on the wrong side when I undertake to defend a group in their fundamental rights, and the laboring man has certain fundamental rights that have been a struggle for him to get. Those rights are recognized by the Constitution of the United States and the highest Courts of our land. I think that I am not on the wrong side when I undertake to help them defend their fundamental rights just as much as Mr. Allen says they are helping to defend fundamental rights.

There has been a great mass of evidence taken in this case, and a couple of hundred exhibits. I would say that 50 per cent of that hasn't much, if any, bearing on this case. There are certain fundamentals that you will have to determine in order to reach your verdict in this case.

We have stated to you that the common laborers were organized by the United Construction Workers, that what they did was within their fundamental rights as shown by the Constitution of the United States and by the laws of Kentucky,

and you have been instructed as to what those
page 2651 } laws were and what rights they give. They claim that we did not properly exercise the rights we had. We claim that any damage or loss in this case was occasioned by the acts of Mr. Bryan. Those are the ques-

tions that you have to decide before you decide anything else, so they are the questions which I want to talk with you about today.

The first thing is that it is admitted that the common laborers were not organized in any union. The Court has instructed you that they had a right to organize. They were not covered by the contract Mr. Bryan had with either the Richmond Council or with the local union. Mr. Bryan recognized that when he testified in regard to the Paintsville contract that he didn't have anything to do with the common laborers. "Other than carpenters and millwrights, this agreement did not affect anybody else." That was a contract made without consulting in any way, without affecting in any way those common laborers.

Mr. Allen has said that what we were attempting to do would be a breach of contract, and that as guaranteed in the Constitution the obligation of a contract could not be impaired. These common laborers were not a party to that contract. Their rights were not consulted when that contract was made. It provided only for the millwrights, carpenters, and like skilled labor. So there isn't any question of any derogation of the rights of any of the parties to page 2652 } that contract for anything that the common laborers did.

The first question is, were the common laborers organized into a union under the United Constitution Workers? That Mr. Bryan has undertaken to deny. Starting away back prior to July, Prock Jackson has testified that while he was a laborer for Laburnum he wrote to Tom Raney and asked him to send someone there or to come there and organize the common laborers. He did not wait for that. He had enough initiative to change his job so as to get a higher rate and go into the Codell Company. Then on July 8 Mr. Robinson and Mr. Hart went to the job site and talked to some of the laborers. They wanted them to organize them. They signed up four of them at that time. They signed up Lee Bach, the foreman of the laborers. They signed up Green Staev. They signed up Matt Miller. They signed up Burl King. They gave to Lee Bach the cards to sign up other laborers. The testimony is that Lee Bach told them at that time that they wanted to be organized.

Then about the twelfth of July when Mr. Hart was over at the Codell Company, he got word that they wanted to know what he had done with Laburnum for them. So he sent them word that he would talk to Laburnum and let them know. Then he called up Laburnum on the 13th or 14th of July and told them that he was organizing the common laborers and would

like to have a meeting for the purpose of dis-
 page 2653 } cussing a contract. Mr. Bryan said he told him
 that he could not negotiate with them, but he
 asked him not to do anything until he talked with them again.
 On the 19th Mr. Hart got word from the representative of
 the common laborers that they wanted to know what he had
 done, and if he hadn't done anything they were going to strike
 themselves. So he asked them to come to the meeting on the
 24th in order to discuss the matter. That was Sunday, July
 24. They had a meeting at the Carver schoolhouse, and in
 that meeting were representatives of the Codell Construction
 Company, already on strike, the Allen-Codell Company, and
 there were 9 out of the 16 laborers present at that meeting.
 After Mr. Hart had reported to them that he had not been
 able to do anything, those 9 laborers organized and elected
 Jerry Barnett and Ossie Lovely as stewards to represent
 them in negotiating in connection with Mr. Hart. That is not
 denied. That was a complete organization. They took the
 obligation at that time with the UCW. There was no ques-
 tion of forcing them to do that. They didn't have to come to
 the meeting. They went there of their own accord. It wasn't
 necessary thereafter for them to sign any cards. The only
 purpose of signing a card thereafter was for the check off.

Following that meeting, they adopted a plan for striking,
 and on the 26th came to the Laburnum site, first going to
 Allen-Codell, then coming to the Laburnum site.
 page 2654 } These men came with them for the purpose of a
 picket line. There these laborers who had al-
 ready come there with the UCW, who had already obligated
 themselves, signed up cards, and those four who had already
 signed again signed, and all the laborers except one, that is,
 15 out of the 16, signed up, 9 of them there in addition to hav-
 ing already obligated themselves.

So I don't think there can be any question but that there
 was an organization at that time.

Mr. Bryan says, however, that the common laborers were
 in the A. F. of L., that they had signed up previous to that
 time. On that point they have produced certain cards signed
 by all the laborers, A. F. of L. cards, signed on the 21st of
 July, but those cards were never turned in to the A. F. of L.
 union, and the president of the A. F. of L. union at Salys-
 ville tells you that they could not take in laborers, that it was
 a union of carpenters and carpenter apprentices.

Mr. Bryan had given instructions to Mr. Delinger after the
 telephone conversation to have those laborers signed up in
 the A. F. of L. He instructed Mr. Delinger to disregard the
 UCW and pay no attention to them. Mr. Delinger thereupon

went up to the top of the mountain, he said, and talked to Monroe Sublett, the president of the Paintsville union, and he told him, "You had better try the Salyersville union."

Mr. Delinger, under instructions from Mr. page 2655 } Bryan, gave Mr. Poe time off to go and sign these men up.

You saw those cards. You heard the handwriting expert, Mr. Cassidy. He tells you that all those cards that were filled in were filled in by someone other than the signer, and all were filled in by the same person. Also the financial secretary of the Salyersville union has told you that those cards were never turned in, that they never held a meeting to take them in, and nothing was ever done, and Mr. Ragan has testified that those cards were turned over to him in July. They weren't signed the 21st of July, these matters were not concluded at that time, and he turned them over, cards that should have been in the records of the Salyersville union if they were a part of their official records.

Poe was a carpenter who was an employee of Laburnum Corporation, and Mr. Bryan testified that "Bob Poe was a carpenter who has worked for us for some time and became business agent of the Salyersville Local. Pursuant to Mr. Delinger's request he arranged to have those applications signed, and he gave them to me through Mr. Ragan and there was no question about the genuineness of them whatsoever."

Mr. Bryan has stated in his evidence that no inducement was held out to the men to sign. Let's see what he said. "Mr. Delinger told me he would discuss it with the representative of the union and that Mr. Sublett thought it was a good idea that the labor should be taken into page 2656 } the Salyersville local union as carpenters helpers. He told me neither one of the business agents had the forms and they would phone to Louisville and ask them to rush them out. As soon as the forms came, we were going to talk to the laborers about it." Mr. Poe was allowed to go out and talk to the laborers and sign them up.

Then this question: "You were going to change the classification from laborers to carpenters helpers in order to get them in the union?"

Answer: "That is right, and maybe give them a wage increase."

Mr. Bryan testified here the other day he had never heard about a wage increase. His memory was evidently bad because he had testified on cross examination to me just what I have read to you.

So that is the situation there with regard to the A. F. of L signing them. It never amounted to anything. It was never acted on, and they never became members of the A. F. of L. union.

The Court has instructed you that the common laborers had a right to organize and that if the plaintiff restrained or coerced them, the plaintiff was acting unlawfully.

Mr. Bryan undertook to select the union into which those men would go. That was not within his province. He had no right to do that. When he gave through his page 2657 } manager instructions to have them signed up in that way and to make inducements to them, he was in law restraining their right of free election.

The next thing that comes up is the question, was there a legal picket line or was there a strike? Mr. Bryan testified he never heard of a strike until he heard me mention it in my opening statement. I think the evidence is very full on that. Mr. Bryan testified: "When I got to the office at the job site on July 26, 1949, Mr. Ragan handed to me a placard, a piece of cardboard, sometimes called a picket sign, which had been placed on a barrel just outside of our office, which Ragan had taken down—"

Mr. Sublett said at the meeting that night, the 26th, that the carpenters had "Mr. Bryan will you put on a pair of carpenter's overalls and lead us across the picket line tomorrow morning?" I told him, 'Mr. Sublett, yes, I certainly will.' "

Then Mr. Bryan testified that on the 27th when he went back there he found a picket sign near the office, and he went over and pulled the picket sign down. Those picket signs have been shown to you here.

On Sunday the 31st it was testified he went to the job site. He was asked, "Did you go to the schoolhouse when you got out there on the job site?"

"The first place we went to was the school-
page 2658 } house." Was anybody there?" "Nobody was there but there was a picket sign."

He made the same reply when he got to the office.

So there were picket signs. That large black and red one was the one that was there at the office at the time.

After being questioned about the picket sign he took down, he was asked, "The only use of a picket line is in connection with a strike, isn't it?"

"I don't know whether it is the only use. You generally associate a picket line with a strike."

So Mr. Bryan certainly had notice of a picket line, and a picket line means a strike.

Then Bert Preston, who was the business manager, was there. Bert Preston got rather mixed up on his testimony here. He denied his affidavit and the deposition he had previously given. On cross examination he admitted he told Hart if the UCW established a legal picket line the local union would honor it and if they did not have a picket line the next day they sure as hell would work.

Bert Preston testified he told Hart that he would have to put up a card to show what he was picketing for, and then testified that he told Starr that they had put up a picket line and they would have to recognize it. Bert Preston said:

“The end of it was that he was going to picket, page 2659 } and he told one of the fellows to walk out there and stand, and I told him we wouldn’t recognize that kind of picket, that they would have to put up a card to show what they were picketing for.”

“Question: Did he do that?”

“Answer: Yes, sir.”

Henry Starr also testified as to where the picket sign was put up.

“Yes, sir. He went out there to put up one and Bill Maynard, of the coal company, asked him not to put it up.

“He then took it down and put it on the road five or six hundred feet over to the highway and left it there.”

Jack Patrick and Paris Trimble both testified that they heard Bert Preston tell what I have just read you that he testified to, and Jack Patrick said, when asked why he didn’t go back to work, “In the first place, they threw a picket line on it, and in the second place if they hadn’t, I would not have gone back.”

Then Chester Trimble testified that Hart said: “I am going to stop the job.”

“Bert said ‘how?’” Hart said, ‘I am going to put up a picket line.’ Bert said, ‘A picket line, according to law, we can’t cross it.’ He said ‘I will send a man over there at the foot of the stairs.’ Bert said, ‘By God, we will
page 2660 } to by him. He doesn’t mean nothing standing there.’ ”

So Hart wrote out a picket sign and put it up just as Bert

Preston had told him he would have to do to establish a legal picket line.

Mr. Lonnie Dixon, one of their witnesses, testified:

"Did you go back to work that afternoon?

"No, sir, I didn't.

"Why?

"They threw a picket line up.

"Were you scared to go to work?

"Well, I didn't cross the picket line.

"Was it on account of the picket line or on account of being scared or both?

"Well, we are supposed to honor a picket line. We ain't supposed to cross that line, you see. I wasn't afraid of nobody, but I would rather not went across."

Otto Preston confirms what Bert Preston said in the two letters. He also confirms that Preston, the next day, on the 27th, asked Hart if he still had his picket up and when he did he said, "I have no talk for you."

LeGrand Mayo said that Bert Preston said, "They are going to put up a picket line, and we can't cross the picket line, and we will have to wait and try to get it straightened out."

page 2661 } Then LeGrand Mayo testified that on the 27th,

"Well, they still had their picket line up and men. There were the pickets, but at that time they had moved it over to about where Laburnum Construction office was and they said there would be no work and we sat around for a while. The men I seen there that day were still there with their pickets that morning."

Mr. Salvati testified that he was present on an inspection trip on one particular day when the trouble arose.

"Did you see a picket line at that time?

"I did.

"Did you note any violence or hear any threats while you were there?

"I did not."

There is an outsider testifying.

Mr. Haslam, the superintendent, testified that he was called down to the tippie where the men were as soon as they came there, and that there was nothing in the way of violence, nothing unusual, and he testified that on the 27th the picket line was there.

Mr. Hart has testified the same thing as to what Preston

told him, and he testified that the men were there with him to support the picket line.

Grant Davis, a carpenter, testified that when he went back on the 27th there was a picket sign at the fork page 2662 } of the road, and he and the people with him halted at that picket sign. They did not go through it because it was a peaceful picket sign.

"There were two pickets that I seed of at that picket line, and they had a picket sign tacked up on a stick. Mr. Bryan tore the picket sign down and then asked the men to go to work."

Grant Davis went back to the top of the hill. He didn't have to cross the picket line to do that. He went around. Some of the boys said they were afraid to go to work and some said they weren't afraid, but they would not go through the picket line because they thought they ought to stay out to sympathize with the other boys, that is, laborers. He heard no threats made to shoot anybody or beat anybody. He saw no one disorderly.

"You were not afraid to go back?"

He felt he ought to stay away to sympathize with the other boys. He said the boys who were afraid to go were just natural cowards.

Mr. Harrison Daniels, a carpenter, testified that at the meeting on the 26th Bert Preston said he would not cross the picket line. He saw Mr. Bryan take the picket sign down on the 27th and went back to work on the 27th at the top of the hill and Delinger called him off. They all met at the office and Bryan was still trying to get the men to go page 2663 } back to work and the men just decided they wouldn't cross the picket line and go back to work. This is one of the carpenters testifying. Nobody threatened Mr. Bryan when he took down the picket sign. He heard no cursing or threats to shoot anybody. He later saw Bryan in the Herald Hotel and talked to Bryan. Bryan told him he didn't know anything that would do him any good. Asked if he was afraid to go back to work, he told him he was not afraid, just as Grant Davis had.

Mr. McClellan was at the carpenters' meeting. He said the picket sign was taken down before he got there. He saw Bryan lead the men to the tipple. He went to work.

Here is the one that Mr. Allen took so much store by, who said "Sh-h! Sh-h. Trouble, trouble." He didn't say that.

He said the man who came there and wanted him to call the people down from the top of the tippie was the one who said that, and he refused to do that unless and until Delinger or Patrick came there, and they came and took the phone out of his hands and called the men down.

Lee Allen, who was there to get a job, testified he saw the picket sign, and he refused to go back when Bryan offered him 90 cents, that is, he refused to sign up. He testified he was not afraid to go to work.

Lee Bach went back on the 27th and talked to Mr. Bryan there. He told Mr. Bryan the reason he did not
page 2664 } go to work was that he honored the picket line and would not cross it.

So there we have the question of the picket line.

That shows that there was a strike.

In addition to that, it is not denied that the laborers at the meeting on the 24th at the Carver schoolhouse unanimously voted to go on strike. They adopted a plan, namely, that the Codell Construction men, who were already on strike, would join Hart. They would then go to Allen-Codell and those men would quit work and join them, and then they would go over to the Laburnum site, and the laborers there would quit work and join them.

So I think it is conclusively shown that there was a strike, that there was a picket line established.

They further claim that this was a disorderly mob that came there. What is the evidence on that point? The evidence is that these men were composed of the laborers of the Codell Construction Company, the Allen-Codell Company, and the laborers of Laburnum who joined them. Many of the men testified they knew them, that they were neighbors and they lived around there. They went there for a common purpose. They were all working there on the development of that mine under their respective employers for the Pond Creek Pocahontas Corporation. They had a common interest in being organized and in being represented in nego-
page 2665 } tiations with their employers. They went there for that purpose.

Mr. Bryan testified that he had a report from his people that there were from 75 to 100 persons, that Laburnum's workers had been threatened and intimidated, that a lot of the crowd was drunk, that a lot of them were armed, that his employees were outnumbered and that they didn't have any choice. You remember there were 64 employees of Laburnum there, some of them working at the schoolhouse, some working on the tippie, four or five working up on the top of the mountain. On cross examination, however, Mr. Bryan testified,

when asked to read his notes, that: "Many of our workers believe that some of the group headed by Hart were carrying guns or pistols. While nobody saw any guns, some of our employees thought they saw the outline of pistol handles or bullet cylinders concealed under the shirts or in the pockets of some of the group."

Henry Starr puts it at between 50 and 75. He claims the men were drinking, that he saw two guns sticking under their belts and other prints of guns under their belts. He saw no knives. No disorderly conduct.

The cursing was not addressed to any particular person. All through this you will find that nobody testified that he was cursed or that he was threatened. They speak of it just in general language.

He said Hart made threats. He is the one page 2666 } Who said he was afraid to go back. Henry

Starr was the foreman of the carpenters. He had to justify what he had done.

Bert Preston said there was something near 40 men. Bert Preston said he never saw a drunk man, and never saw any weapons. That is their own witness testifying.

Now take the three Hackworths who told a remarkable story in that it was almost exactly word for word from each of the three brothers. They said they saw from 35 to 50 men. They all claimed that some were drunk. They all say they saw no guns, although Jack Hackworth claimed that one of the men rubbed up against him so he could feel a gun in his shirt. The testimony shows that the Hackworths were working on some lumber going to the schoolhouse, which was on saw-horses. They were on one side and Mr. Hart and his men were on the other side.

The only man who goes clean up in the air is Chester Trimble, who said from 100 to 150 men. Paris Tribble saw 60 men.

Jack Patrick, the steward, said he did not see any drinking. He didn't say he was afraid. He referred first to the picket line. That was the first reason he didn't go back.

I read you what Lonnie Dixon said, that he was not afraid to go back but would not cross the picket line.

LeGrand Mayo said he didn't see any one take page 2667 } a drink, no one hit him, he was not harmed in any way. He put his finger on what it was. He said there was just loud and boisterous talk. Loud and boisterous talk isn't violent unless it is followed by some act.

Delinger testified he counted 47 men and perhaps there were more there. Of course you remember his description of them as a movie picture mob, that the men were badly dressed.

Certainly they were badly dressed. Most of them had come off from work, had on their working clothes. Those who were working in the quarry, in the dust of the quarry, of course their clothes looked dirty.

Prock Jacison, who was there at the quarry, testified that there were no drunk men when Hart came there.

Hart testified he had between 20 and 30 men, and that they were composed of the laborers of the three companies I have mentioned. It has been suggested by one of the counsel on the other side that Hart was referring only to the men he had at the schoolhouse. There wasn't any other for him to get after that. And the men at the schoolhouse said, "When we eat our lunch we will come on up to the tippie, and they did, so they were all together at the tippie.

John McClellan talked to the A. F. of L. men on the 26th. He said there was no cussing, no threats, no drunks, no violence, no guns.

Lee Allen, who went there to get a job, testified page 2668 } tied to the same thing.

Lee Back said there were from 20 to 25 men, none drunk, not *outline* of guns. Employees were not forced to sign, but signed willingly. In fact, most of them were signing up a second time, having already obligated themselves.

Burl King estimated between 20 and 30 men with Hart. Ernest Howard said none of the men were armed. He heard no threats.

Those last four men were these laborers.

The only testimony is they claim that one man, one of the laborers—they saw a man get on each side of him and a man behind him and said, "sign up." That is the only evidence they have offered in this case of violence.

Haslam, who was certainly disinterested, saw no disorder and nothing unusual, and said there were 25 to 30 men. As I said, Salvati saw none, but he saw the picket line.

The state trooper said he investigated and there was no violence there.

On the other days after the 26th there was no crowd there. The testimony is that nobody was hurt, nobody was hit, nobody was shot at, and yet Mr. Bryan who, if all this disorder was threatened, all this violence was threatened, would be in the eyes of those men the chief devil, went around there and nobody ever shot at him, nobody ever threatened him or went around at night. Although those roads, he said, were so dangerous, nothing happened to him. Nothing happened to him when he pulled down the picket sign, and if there was ever an affront to a union, it is to pull down their picket sign. Nobody stopped him. Mr.

Robertson said all he was asking, he was hopeful they would honor the picket line, that if they went across the picket line, that was that. The men did go across the picket line there, and none of them was hurt.

The men who testified that they were afraid to go back were the leaders of the A. F. of L. As I have shown you, all of them recognized there was a picket line. Perhaps they had to justify themselves in what they did, and as a secondary thought they said they were afraid to go back.

A strike, gentlemen, is not a pink tea, and the court has instructed you, "minor disorders and trivial rough incidents on a picket line, not serious enough to intimidate or coerce a man of ordinary strength of character, do not deprive the picketing of its peaceful character."

He also advised you that the rights to bargain, to associate collectively, and to go in a crowd are not lost because others who are not employees of the plaintiff join with them in asserting the employees rights.

So even if there had been outsiders, they were not violating the law.

page 2670 } The court has further instructed you if the men were frightened off by the reputation of Breathitt County for violence, that that is not a responsibility of or a liability of United Construction Workers. The only excuse these men give, other than that they didn't want to cross the picket line, was that they were afraid of the violence by reason of the reputation of Breathitt County. If that is the case, the Court has instructed you that the defendants are not liable by reason of anything the men did through fear generated by the reputation of Breathitt County for violence.

You all know what a strike is for. The purpose of a strike is to close down the operation of a business until a contract can be negotiated. It was entirely within their rights, so the court has instructed you, under the laws of Kentucky, for these men to strike.

It is for you gentlemen to say, on the evidence that you have heard, a good deal of which I have outlined, whether there was violence or whether there was just minor incidents, as the Court said, which would not affect a man of any strength of character. We submit that they were entirely within their rights when they went there when they set up a picket line, that no violence has been shown, and that they had the right under those circumstances as the court has instructed you—"In the exercise of these rights, such employees had the right to interfere with the plain-

page 2671 } tiff's business without being liable in damages for such interference."

So much on the question of whether UCW was within its rights when it went there and when it established a picket line, when it maintained that picket line, from that time on.

The other phase of the question, the position that we took was that Mr. Bryan's own acts were the cause of any loss of business or any loss of business connection. Mr. Bryan said that when he was called on the 14th he told Mr. Hart"

"I told him that we had agreements with the A. F. of L. unions, and it wouldn't work out, that I didn't see how we could do it. So I told him I would think about it. I didn't see how I could do it. I asked him to think about it and to let me hear from him again before he did anything."

What did Mr. Bryan do? He asked this man not to do anything until he talked with him again. He immediately picked up the telephone and phoned his manager to get these men in the A. F. of L. He phoned him to ignore the UCW. He went out there on the 19th or 20th of July. He didn't go anywhere near Mr. Hart. He didn't try to talk to him. He never asked Mr. Hart, "Let me see whom you represent and let us sit down and talk about it. I think that is extremely poor business judgment. I think any of you businessmen
page 2672 } would have said, "All right, let's talk it over."

You might not reach any agreement, you might still maintain your position, but certainly if you felt that your business was being risked, you would say "Let's sit down and talk."

Mr. Hart had the right to think that when he asked him not to do anything until he talked with him again.

If a lawyer phoned me that he had a claim against a client of mine and after a few minutes discussion I said, "I want to think it over. Please don't do anything until I talk to you again," and then I immediately turned around to do something to defeat that claim, I think that I would be disbarred from the practice of law.

Mr. Robertson: If Your Honor please, I think this is improper argument. Mr. Mullen has no right to testify in the case like that. He is arguing the testimony, not what would happen if he did something that would cause him to be disbarred.

Mr. Mullen: I was merely illustrating—

Mr. Robertson: I know, I think it is an improper illustration.

The Court: Go ahead.

Mr. Mullen: Let it go.

Mr. Robertson: I don't think you will ever be disbarred.

Mr. Mullen: Thank you. I won't ever do such a thing.

As I say, he went out there and didn't try to
page 2673 } do anything and didn't have any talk with Hart.

But he did talk to Delinger about getting the men in the A. F. of L. That was rather an abortive effort as I have already discussed with you. He was simply following a plan that had worked over at Hopewell. At Hopewell he had 37 common laborers who were not in any union. Mr. Fohl signed up 31 of those. He signed up 10 of them in April, 1948. He signed up 9 more on October 11 and October 15. That was 19 of the 37. There are four cards that have a date on them, but failed to have the month. There were six, I think, that are not dated. He had a majority long before he ever went to Mr. Bryan.

He phoned Mr. Bryan on the 21st of October, according to Mr. Bryan's testimony, and told him he wanted to talk to him, that he represented his laborers. Mr. Bryan put him off until the 27th. He put them off until the first of November. I said, "Mr. Bryan, what did you do?"

He said, "I immediately phoned Joinville and told him to get busy and sign them up."

Those men had been signed up, some of them, for six months, all of the 31 and before he ever went to Mr. Bryan, and they had had meetings to obtain initiation fees and dues, and yet Mr. Bryan followed that plan and he undertook to follow the same plan out there in Kentucky.

Mr. Allen said that the reason they went out
page 2674 } in Kentucky was because of that occurrence in

Hopewell. If they wanted to get after Mr. Bryan by reason of that, they had plenty of time to do it. Mr. Bryan had eight contracts in West Virginia, which is in region 58, over which Mr. Hunter was in charge. He wasn't disturbed on any of those contracts. It was only here, where his common laborers were not organized, where they sought organization, where Mr. Bryan tried to thwart their organization and a union of their own choosing, that any trouble occurred.

Mr. Bryan was not there on the 26th. He was not there and doesn't know what happened. He has only reports, what he wrote up for his witnesses to sign, you remember he said was mimeographed in Huntington. That is what he has been largely depending on. When he saw Mr. Hart that afternoon, Mr. Bryan immediately started to ask what the hell he was doing, shutting down his job? He didn't say to Mr. Hart, "Let's sit down and see what all this means. Let's talk this over and let me know whom you represent. I would like to see what can be done." Wouldn't you businessmen have

followed that course if you thought your business was in jeopardy?

Instead of that, he told him he wouldn't negotiate with him. "I told Mr. Hart that I was going to finish the job and I wasn't going to use United Construction Workers men."

He said at the meeting on the night of the page 2675 { 26th, "I said that based on my experience with

United Construction Workers that afternoon I didn't care to make an agreement with that organization or to use any of the men."

He testified in answer to a question that I asked him, "I had just as soon negotiate with Mr. Hart as with a robber in my home." He hadn't ever met Mr. Hart. He didn't know whether Mr. Hart was an angel or a devil. He at least could have sat down with him and tried to find out and see if there was any way to prevent trouble. No, he didn't do that. He was going to have his own way. "I am not going to do any negotiation with you. I am going to finish the job, and you just go jump in the lake as far as I am concerned."

Mr. Robinson, who was with Mr. Hart, went back there on the 27th. First, before that, on the 26th I asked Mr. Bryan, "You didn't try to negotiate, didn't try to get a peaceful settlement of it?"

"There wasn't anything to negotiate about."

He never asked Mr. Hart, "Let me see your cards," or anything else. If Mr. Bryan disputed that he represented them, he had means open to him to find out whom he represented; he had a right to ask for an election by the National Labor Relations Board in any labor dispute, and they would determine once and for all who represents any group of men.

That would have disposed of the matter, but he page 2676 { didn't do that. He said, "I told him we had agreements with A. F. of L. unions and it wouldn't work out." He said he told him that over the phone.

We put Mr. Cundiff on the stand, who followed Mr. Bryan there and did work, and Mr. Cundiff said, "Yes, I employed skilled labor in the A. F. of L., and I employed common labor in the UCW. I was there for seven months. I never had any friction whatever in working the two together."

Mr. Bryan had been working union men and non-union men. That is harder to do than to work two unions.

Mr. Robinson said that he went over there and talked to Mr. Bryan. Mr. Bryan said he made no threats. He said to Mr. Bryan, "If you are talking about a strike, we can settle it," and Mr. Bryan said "How?" He said, "Let's sit down

and talk the matter over and see if we can reach an agreement." Mr. Bryan again refused to do so.

On August 1 Mr. Bryan testified that he was at the job site and that Mr. Hart came over there, and he had Mr. Hart talk to Joinville, and Mr. Bryan testified that he said to Mr. Joinville, "You can't work unless the men join the UCW," but when Mr. Bryan read from his notes it shows that what he told Mr. Joinville in Mr. Bryan's presence was, "You can't work unless you recognize the laborers." That was all he was after. There is plenty of evidence all through this to show that he was after no one except the laborers.

On August 1—I don't care what had happened page 2677 } prior to that—he said "Mr. Hart told me—I said for the first time—the only people he was interested in were the laborers, and if I would recognize the UCW as the representative of those common laborers they would all go back to work."

Gentlemen, what would you have done if that had been your business? Wouldn't you have grabbed that opportunity—

Mr. Robertson: If Your Honor please, that is improper argument.

Mr. Mullen: That isn't improper.

Mr. Robertson: The Court has ruled time and again that you don't put the jury in a situation like that.

Mr. Mullen: I am not asking them to answer any question here.

Mr. Robertson: Yes, you are. I submit it is improper.

The Court: Just ask what the average person would have done under the circumstances.

Mr. Mullen: All right, what would the average businessman have done under the circumstances? Wouldn't the average businessman have grabbed that opportunity? Wasn't that an opportunity that Mr. Bryan had to prevent any loss he is now claiming damages for?

page 2678 } If Your Honor please, I have until 10 minutes or until a quarter past?

The Court: You have about until about 12 minutes after.

Mr. Mullen: Also at that time he asked Mr. Hart to throw over the laborers and let the carpenters do the work that the laborers do, which Mr. Hart very properly refused. The next day he asked Mr. Hart to come over to Salyersville and there was a meeting of some 10 or 12 of the high men in the A. F. of L. They talked and talked and finally wouldn't talk to Mr. Hart. So Mr. Bryan came out and said the A. F. of L. wouldn't let him do anything.

The A. F. of L., if they had a contract with him to furnish him with workmen, certainly fell down on the job, and when

the other party to a contract falls down on the job, is a man going to sit still and say, "Nevertheless I am bound by it. I ain't going to do anything to save my business or to help my business in one way or the other." He had ample opportunity. He was willing to throw over the Paintsville Union and take the Salyersville union. He had a perfect right to go and make an agreement with these men. He had it at all times, as a matter of fact.

Then he goes back to Huntington, and he talks it over with Mr. Salvati, and then he has them write him a letter terminating those contracts, and Mr. Salvati says "I understand," so and so. Mr. Salvati said he didn't know of it.

Then he goes to Mr. Hunter and talks with him for four hours, leaving him under the *impressing* that he is trying to negotiate a contract. After talking for four hours he turns around and says, "Mr. Hart doesn't know whether I am going to sue him or what I am going to do."

But one very significant thing right there. He said to Mr. Hart, "I could organize a separate corporation to do this business here." Again, wouldn't a business man have taken that means which he himself recognized in order to save his business and to save his connections if he wouldn't follow the other course? He recognized that there was a way open to him to do that.

So it goes on to May 15, and he goes over to talk to Hunter again. Hunter said, "You as an American citizen have a perfect right to bid in Mingo County, but if you do bid I will try to organize your men, and if I succeed I will expect a contract." It was entirely within the rights of Mr. Hunter and the UCW to do that.

But he goes back and tells Mr. Salvati that Mr. Hunter said if I get a contract he ain't going to let me build the houses, he ain't going to let me complete it. That wasn't what Hunter said. That was the basis on which Mr. Salvati wrote him the letter.

His business wasn't broken off at the time of page 2680 } this suit. He was bidding, he continued to bid, he was asked to bid, he was offered the opportunity of bidding, and he bid after this suit. They were contracts not only down there at Evanston, but in other places. The evidence is that he did bid on contracts and he bid about \$75,000 or \$80,000 higher than anybody else, and added conditions with it which made it look like he wasn't trying to get the contract.

I think it is true that Mr. Salvati was his friend. I think

he was a very good friend of Mr. Bryan's. I think he did everything after August 4 to give Mr. Bryan an opportunity to use some business judgment and to continue his work out there, and Mr. Bryan could have done it by using business judgment. I don't know of a worse example of poor business judgment than he exercised in this case, and the failure to exercise good business judgment was what terminated his business relation with the Pond Creek Pocahontas Company and its associated companies.

I think that and the stand of the A. F. of L. after they failed to live up to their contract are the basis of any loss that he had, because he could have prevented it. He could have followed any of the courses that I have told you were open to him, which he himself knows, one of which he himself pointed out. I can't imagine any contractor refusing to stay in business. You have to go in various union territories if you are building all over the country. You have to adapt yourself to the territory that you go in. All he had to do was to reach an agreement with those 15 men and save the other 48 jobs and go on with his work.

Gentlemen, I have tried to go over this matter from the standpoint of a businessman. I have tried to show you just what were the legal effects of what was done. I have tried to show what was open to Mr. Bryan. I do not possess the oratorical gifts of my friends on the other side. I can only talk as a plain businessman. I think that I have shown you that our position in this is the correct position, that it is justified by the evidence, and I leave the matter in behalf of my clients in your hands with that explanation of what we believe the case is.

I thank you.

The Court: Gentlemen, the Court will take a five-minute recess.

(Brief recess.)

The Court: One hour and 15 minutes, Mr. Robertson.

ARGUMENT BY ARCHIBALD G. ROBERTSON IN BEHALF of the PLAINTIFF.

Mr. Robertson: If Your Honor please, and gentlemen of the jury, we come now to my final part in the trial of this case. Four weeks ago all of us were called from our different walks of life, and for the past 28 days you have listened to a

story that has been unfolded here which I believe you will never forget. When we separate this evening and go our several ways I believe your verdict will be flashed from one end to the other of this land because I think this case represents far more than the mere sum of \$500,000 and far more than what Laburnum gets out of it.

I think, as you will recall, it is a case where Hart, whose own boys called him a liar, has won the first half of his bet, "I'll bet you \$500 you will never finish a job in Kentucky unless you use UCW workers." The verdict, the news that is going to be flashed from this courtroom tonight is, does Hart win the second half of his boast, "Nobody yet has ever yet been able to buck the United Mine Workers of America, and you can't do it, either. We have shut down other people throughout Eastern Kentucky and in West Virginia, so why should you complain?"

It is for that reason that this case has been brought here, which is a case to cover compensatory damages to make good the losses, present, prospective and past, that I am going to mention in a little while, and also to punish this wicked and cruel and arrogant "one organization." I dare say that the lights will be burning this evening at 900—15th Street, Northwest, where John L. Lewis maintains his office and where his brother, A. D. Lewis, maintains his office and where his daughter, Kathryn Lewis, maintains her office, and where they can communicate by telephone with the niece and her husband, Fohl, in Richmond.

I came here of course with an orderly, organized argument, and as almost always happens when you are the last one to speak in a long case like this, you have to cast it all aside and just discuss what appears to you to be the main points in what has been said by the other speakers, and that is what I am going to do now.

First I call your attention to two remarkable things here. In my opening statement I said to you it is admitted that the United Construction Workers is a division of District 50, and it is admitted that District 50 is a district of the United Mine Workers of America. The Court says in one of its instructions it is up to you to say whether those two defendants were acting as the agent of the United Mine Workers.

I call your attention to the fact that although three speakers have spoken for these defendants here, not one of them has said one word denying that District 50 and United Construction Workers in everything they did here, good, bad or indifferent, were the agents of the United Mine Workers of America, and I say by their failure to deny it here in their

argument, they have admitted it and that all three of them are the "one organization."

I say to you further that not one word has been said—and they have the best lawyers in the State of Virginia on the other side—not one word has been said here repudiating one thing that Hart said or did. I call your attention—just as they come to my mind, the will come back to your mind sometimes—who was it who said that Hart said "Yes, I will have 500 men here from Beaver Creek and there will be some butt kicking here on this job. It was a good thing you pulled out of there because I had men in the hills who would knock you off the job."

I say they have admitted agency. They have admitted that they are all three in the same boat. If you believe that Hart did anything wrong, then they are all part of the same stick and all subject to the same verdict. It is one organization. Where does it lead, and who do you think pulls the strings and calls the tune and runs the show?

Let me do as I said I would do and come to the comments I want to make, and I will try to move on. I realize, when so much testimony has been introduced here that covers so many witnesses and so many pages, how easy it is to be unable to remember precisely and accurately what they said and to quote them unfairly or incorrectly. I hope I will not do it, but I don't want to slow the thing up by going back to my notes any more than I can help.

As Mr. Allen pointed out, if Hart, who David Hunter says is a liar, was going to the school house to sign up six or eight laborers, why did he take 20 or 30 men there, page 2685 } according to his own admission? Have you heard anybody else in this case say, on the other side?

They just assumed to you that the laborers were all that were involved in this thing. According to our testimony it was the carpenters, the carpenters' helpers and the laborers, all along.

We do not deny the right to strike. We do not deny the right to picket peacefully or to assemble peacefully. But you cannot kick people and threaten people and coerce people off the job.

I am not going to waste my time or your in arguing to you whether or not Ham Bryan is worthy of your belief. I think you believe him. I am not going to call the roll of these witnesses about the threats and force and coercion and the danger that was out there in that dark and bloody country. I think you are convinced there was.

I don't care whether there was a strike or whether there wasn't a strike, or whether there was a picket line or whether

there was not a picket line, if you have the right to strike, you have the right to picket peaceably; you haven't the right to bring 500 men from Beaver Creek and run you off here, plenty rough, or lay out in the bushes and shoot you off the tippie, or "Sh-h! sh-h! trouble, trouble!" You can't pooh-pooh it. When anybody tries to pooh-pooh it, they are a city man who never has been out in the bushes.

I would like to say to you again that what we
page 2686 } say is that this business relationship was terminated on July 26. That is what ran us off.

That was the last time we ever got a dollar of work. Everything that happened out there after that that we put on here was just evidence to demonstrate and prove and show what they had done to us at that time. I am coming back to that.

Talk about future profits, I can't forbear saying this here. Fohl, the nephew-in-law of Lewis, said over in Hopewell the job was finished, and therefore they couldn't worry about that, and they let it wither on the vine. And also Bryan said that when Fohl claimed he was representing all the laborers there at Hopewell, he checked up on it and found it was a lie, that he didn't do it, and that he had no confidence in him from then on.

Then when Hart, the liar, called upon Bryan either the 13th or 14th, according to Bryan he said "We are not so much interested in what you are doing now. It is what you are going to do in the future," these two hundred houses, all this big work. That is what Bryan was interested in, too. That is where Bryan lost a lot of his money, and that is why Bryan took this unattractive job in Breathitt County under unfavorable conditions, because he knew after he got out there and got his organization set up and running smoothly, it would be just

like amortizing something in the manufacturing
page 2687 } business; he would get going and going good in the future.

There is something very interesting here. I know how hard it is of anybody to listen to something being read, and I am going to make it short, but I call your attention to one of the most interesting things in this case. Bear in mind my proposition so far is this: That they had the right to strike, that they had the right to picket peaceably, but they didn't have the right by threats or force or coercion or intimidation to run them off the job. Nobody here has repudiated the authority and the actions of Hart. They don't say "We didn't give Hart the authority to do what he did." They don't say that Hart went beyond what he had a right to do. They say whatever Hart did was right, lawful, peaceful, and proper.

They said that Hart was representing the United Construction Workers, and that these men that he signed up were signed up in the United Construction Workers, and the proper local for them to go into was 778-A, and that is the one they took their obligation in, and that is the one they were in. They say everything Hart did was right and proper.

If you please, I refer you to the rules of the United Construction Workers. Article 10, Strike Policy, Section 1:

“The United Construction Workers recognize the local union as having the initial local authority on all page 2688 } matters concerning strikes or grievances of whatsoever nature, no strike action shall be taken, however, until it has been approved by the majority of the workers involved, and no strike shall take place without first obtaining sanction therefor from the National Director or his designated representative.”

The National Director is there in Washington, A. D. Lewis. You come to rules of District 50 United Mine Workers of America, Article 6, Strike Policy, Section 1:

“No strike action shall be taken which does not comply with existing laws and before it has been approved by a majority of the workers involved, and no strike shall take place without first obtaining the approval thereof from the administrative officer of District 50.”

A. D. Lewis, the Brother of John L. Lewis.

Have you heard of them approving it in here?

On the contrary, do you come to this in these interrogatories which we asked them, and I am referring now to interrogatories to the United Construction Workers.

“When and upon whose authority did United Construction Workers Local 778-A decide to take strike action against the plaintiff's work in Breathitt County, Kentucky, and was the so-called strike against plaintiff which took place in Breathitt County, Kentucky, on July 26, 1949, sanctioned page 2689 } by the National Director of United Construction Workers or his designated representative, and if so, when and by whom was such sanction given?”

And here is the answer under oath, filed in Court:

“No formal strike action was ever taken by Local Union

778-A and consequently there was no occasion for nor was any request made to sanction any strike action."

Their whole idea is—I am not saying this of counsel. I won't stop to pay compliments. Mr. Mullen knows he is a friend of mine of long, long standing, and I won't stop to talk about it now. I say on the part of their clients it is a flim flam to work up a defense here that they are not entitled to. Whether I called for these books here which set forth their duties and obligations and called for their sworn answers to questions.

Then I come to the picket signs which are numbered 1, 2, and 3.

The first one is "UMW Picket line, contractors—Laburnum, UMW, United Mine Workers of America."

They never repudiated that picket sign. They never repudiated it, or they never repudiated Hart. If you find a verdict for anybody in this case, I submit to you that because the principal is liable for the acts of his agent, you have to hang it on the United Mine Workers and punish them to the extent that they feel it.

page 2690 { Then I come to picket sign No. 2 which never was repudiated. What does it say?

"District 50, U. M. W. of A., Local 778-A, Picket Line."

Mr. Mullen says the "picket line" means a strike, and as I say we never had any strike and no strike was ever authorized or ratified or anything.

Then I come to Picket Sign No. 3, which I think Hart said he supplied:

"On strike, Local 778-A."

Hunter was right in what he said about Hart, wasn't he? Doesn't it pin it on him? Isn't he lying there? "Carpenters Helpers and Laborers, District 50, U. M. W. of A."

I say that defense is so shot it is like Dixon if he doesn't keep out of Kentucky. It is shot so full of holes it would take all the sand in the Big Sandy River to fill him up again.

I might as well come to this now as anywhere else because it goes right to the heart of the case. Colonel Harris didn't go into it in detail like Freddy Pollard did, but he discussed somewhat the amount of the damages. I say to you that I have no right to argue to you that you can't return your verdict. "We the jury on the issue joined find for the defendants," and by the same token nobody on the other side has a right to

say to you that you can't return your verdict here in either punitive or compensatory damages or both in the full amount of \$500,000 and that is what I am going to ask of you. I submit that we have asked too little.

Why do I say what I say? I come here to this first thing that they blew up for you. The \$617,500 is what Salvati said under oath that he had authorized to be done, that he didn't have to go back to his board of directors that they were ready to proceed with it and give the work to Bryan, and that they didn't do it because they were run out of there.

Now, let's take it generally first. You will go over the instructions of the Court. I won't stop to read them now. But let's see whether we have a substantial business there that has a record of performance sufficient to justify you in giving damages.

We have a concern here which is a young company as companies go, organized in 1937, which came under this young man's management in 1942, along in there, and over 28 months of performance out in these coal fields out there it showed a profit at the rate of \$28,000 a year. They have no right to argue to you because they didn't get the work, because they didn't do the work, that they are not entitled to damages. If that was the law, this court would not have given you the instruction that it did. The door is wide open for you to give it or refuse it. I am not talking about these figures now. It is just 5 per cent on that. If over a period of 28 months they had averaged at the rate of \$28,000 a year, if you project that out for five years, that is \$140,000. If you project it over a period of ten years it is \$280,000. Salvati has told you without contradiction that he is the president of this whole Island Creek empire, the greatest commercial coal company in the West Virginia field and the third largest in the United States, and that under their plan of development this work would have gone on there for years and years indefinitely. I say if you project their \$28,000 for five years or 10 years you are well within moderation. I say when Salvati said he had this work for the asking, that he had this work for the asking. The fact that they did not do it has got nothing to do with their right to get the profits from it. He may have laid off of it one way or another, like you can't get one contractor and the thing can wait, and you wait. You can't get one doctor or one lawyer, and you may go to somebody else or you may wait. It was significant to me that when I asked Cundiff from Indiana, "When did you do that work?" He said in November 1949, which was after this

suit was instituted and it may well be that this suit, as I hope it has, has put the fear of God in them enough to leave him alone.

They made the argument here that there was no damage to business reputation. Do you think it has done it page 2693 } any good? Here is Salvati who heads up the Island Creek empire, with a list of associated and affiliated companies there as long as your arm. They are driven out of the coal fields of West Virginia and they are driven out of the coal fields of Kentucky, and I think it is a fair argument to say they are driven out of the coal fields anywhere in America where the United Mine Workers are in control, and if you can name me somewhere where they are not, I never heard of it and the spider web exhibit bears me out.

Whose accounting testimony are you going to take, Coleman Andrews' and Hugh Baird's, or Mr. Holt's? Who thinks that every time you add a dollar to your gross business it is going to add an equal dollar to your overhead? Do you think that that work yielding that much profit put 6.6 additional overhead on him or that that profit of \$319 did it or that \$250 did it or that \$125 did it or that \$27,125 did it?

We have sued here for \$500,000, and I say we have sued for too little. I say that we distribute it around that way because they asked us to break it up, and before the suit was tried that was the best way we knew how to break it up. I say it is moderate and conservative and reasonable on every element of compensatory damages.

But here is where I say over and above all that, we sue for too little: The evidence in this case is that this page 2694 } great international union has more than 650,000 members, that District 50 has more than 112,000 members, that United Construction Workers has 46,000 members, that of the dues that come from the Virginia District, of every dollar—what was it—50 cents to the International Union, 35 cents to District 50, and 15 cents for the home boys.

I say it is within your discretion to do it, and as I say the Court has left it wide open to you because if it hadn't it wouldn't have put those instructions to you in the form that they are in. You give or withhold as your honest discretion and your honest judgment tells you is fair and right.

If you should come to the point—I don't think you will—that you say, "Well, I don't know, they didn't do the work, they might have been overcome with some unexpected cost problem there that doesn't show up at this point. I think it is too uncertain and too speculative." I don't think you will

think that, but it is within your discretion if you choose to do it, to award \$500,000 punitive damages against all three of these defendants so it can be the one sum of \$500,000 against all three of them, to be collected out of any one you can get it out of, but only collected once. It would be the way of a Virginia jury of saying, "You shall not pull this kind of stuff in this country of ours and get away with it, and page 2695 } if you take any such insolent and arrogant thing as that, we will put this on you just exactly as we were asked to do and as a deterrent to these three defendants in the future and as an example to them and as an example and deterrent to others to keep them from going ahead and doing likewise."

I have said that Bryan thought he had demonstrated Fohl was not telling the truth about the Hopewell incident. Hart's own boss, David Hunter, said it was a lie, and I asked Hart what he had to say about that, and he said that was unfortunate. They didn't bring David Hunter here to testify to you, and I expect somebody here on the jury to say, "Yes, you summoned John L. Lewis and why didn't you bring him here?" I will tell you why. Because we think we have proved our case up to the hilt for \$500,000 without him, and we had no intention of letting him come here and pull a grandstand play. There is nothing unfair in that, because if they wanted him they could get him here at any hour of the day that they choose to call him.

Mr. Mullen: He is going outside the evidence now, I think.

The Court: I sustain the objection.

Mr. Robertson: Arnett, who repudiated his statement to Bryan. I don't think I have to bolster up Ham Bryan in Richmond. I think he is worthy of the rock from whence he is hewn. I felt sorry for Arnett on the stand. page 2696 } Didn't he let the cat out of the bag when he said, "I live out there in those mountains, and all those people are my neighbors, my friends, my kinsmen." What do you think they would do to him if he didn't come through?

I am going to ask you something else, which I will come to a moment if I have time. All of our people had signed up with the A. F. of L. We told you about the kind of a guy Robert Poe is. It looks like he betrayed everybody. But he signed them up in the A. F. of L., and a number of these other things very mysteriously are not dated. I can prove to you again that Hart is a liar because when he phoned Bryan he told him he represented the laborers, the majority of the laborers, and it turned out afterwards he had signed up but

four on the 8th of July, and according to his own admission he didn't sign up any more until that Sunday meeting, the 24th of July after he had phoned to Bryan, after Bryan had heard about it and he phoned Bryan on the 14th. Then they come here and say 778-A established that picket line and pulled that strike, and there is their sworn answer to the contrary.

I want to say this, too. No pattern of behavior? What do you think after you have heard this testimony? Do you think that Hart and a group of lawless men were going up and down Eastern Kentucky pulling acts of violence and doing at Wheelwright, Kentucky, and at the other towns that page 2697 } have been named here in Kentucky just exactly what they did here? Do you believe the deposition of Nelson Baldrige who was doing that paint work over at Wheelwright for the Inland Steel Company over there? In the vernacular expression, when Hart and his mob stopped them there, what did they say? They said, "Get out, boys," and the boys hit the ground.

What was that report that we had? The pattern of the reports was, every report that Hart made to David Hunter, every report that Robinson made to David Hunter, every report that was made, a copy of it went to A. D. Lewis in Washington. They are all gone for that period, except the one—they didn't get down to one—that called Hart a liar. They didn't burn up the one that said that Robinson had lost his nerve and it looked like he couldn't stick on the job and they would have to get rid of him unless they could pump him up again. They didn't destroy the one that said that Hart—it may not be Hart—that Hunter was going all around through Kentucky with Tom Raney.

I was never more amazed because I thought they were going to deny agency, which I say now because they didn't say a word about it in their argument they have admitted. Were you ever more surprised in your life than when Tom Raney got on the stand there and says, "Sure, we have adjoining offices, we are on the same floor, in the little 7800-people town, we have the same"—I don't think he said the page 2698 } same telephone number there. "We have been using the same post office box for years and years. He comes into my office and asks my advice and asks my assistance and asks me to go around and help him and I do it whenever I can."

I am just following these things as I have made the notes as the others were speaking.

Which one of their witnesses was it—I can't recall his name now—but it is significant that of those four people that Hart

signed up on July 8 when he got them out there with all this peaceful situation in the toolhouse, and out at the job site, every one of the four signed up again. They were asked "How did you happen to do that? That is mighty funny. You had signed up before. You had taken the obligation before." That is one of the outstanding events of an union man's life. "Just unthoughtfulness on my part."

I would like to say this. I think my time will be up at 25 of 5, won't it, Your Honor?

The Court: That is right.

Mr. Robertson: I am going to have something more to say about that later. It is a very significant thing to me, and I thought it was a pathetic thing in this case. It is admitted here that in Eastern Kentucky the United Mine Workers, the one organization, is far stronger than the A. F. of L. out in those hills. You can look at the picture there—
page 2699 } somebody has moved it but it is there for you to look at them if you want to—and see that dark and bloody country, and there is mighty little law up in those hills except what a man is man enough to make for himself. If you don't believe it, you walk up Whippoorwill Hollow at night with Monroe Sublett. I thought it was a pathetic thing when that group of men, a minority group, mind you, but not asking any favors or any special privileges or any unique consideration like we hear of these minority groups so much now, but just unlettered courageous men who wanted to testify to what had happened and had the courage to do it. Did you realize the spot they are on? Do you realize the spot they are on now? As contrasted to that, do you realize—I had the chart made up, but I won't stop to talk about it now—that every one of those laborers or carpenters who came here and testified for them is either now—I think I am correct when I say now at the time he testified was a member of the United Mine Workers or United Construction Workers or District 50? They got on the band wagon, on the strong side, and when the word came to come here, it took no moral courage for them to come. It would have taken a whole lot of moral courage for them to say, "I thank you, I will stay at home."

Another thing that that chart will show, and which is borne out from the testimony, is that some of these people out there—and I don't know that they blamed them—
page 2700 } joined all three unions at the same time, paid dues into all three of them, some into all three, some into two, some into only one. The testimony here is that "If I belonged to one of these three defendant unions, I wasn't scared. I knew nothing would happen to me. Anybody who gets scared is just a natural coward. I wasn't scared. No,

I belong to the United Mine Workers. I belong to District 50. I belong to the United Construction Workers, our one organization," like Gasaway talked about.

Do you think Bryan could get any police protection out there? According to my notes Homer Howard, or whatever his name was, said he told Bryan if he thought there was danger he had better bargain, and Bryan had the guts not to take it lying down. I am going to have something more to say about that.

Now I come back to Mr. Pollard, and I think I have covered all I need to say about him. In the first place he argued to you that we had no right to claim anything for destruction of our business relationship. I very properly said you have no right to argue that to the jury because the Court has expressly told the jury we have got a right to recovery if the jury thinks we have proved it and chooses to give it to us. You ask me, "How do you compute the value of that relationship?" I say under the instructions of the Court the best

way I know to compute it is that through out the
page 2701 } 28 months we have been there we have been making money at the rate of \$28,000 a year, and if you project the five years that is \$140,000, and if you project it ten years, it is \$280,000. I think you have a right to project it longer if you want. I say I bulwark that statement on the testimony of Baird and Coleman Andrews, that whatever he would have made there from the time he was run off would have substantially been net profits as well as gross profits because he could have absorbed it in the overhead that was already set up there.

Damage to reputation. You notice in one of the instructions of the Court that the damage to a man's reputation is such that you just have to estimate it the best way you know how. I don't mean anything out of order here in view of who is in this Courtroom, but it is a stock thing in the cases. A slander and a lie goes around destroying a woman's good name, and you sue them for it, and what is the measure of the damage? The measure of the damage can not be put in dollars and cents. It can be put at whatever a jury thinks is fair and proper and correct. The damage to this business reputation can not be put in dollars and cents. It can be pointed out that they are ruined within the Island Creek empire and all its associated and affiliated and subsidiary companies. They are ruined so far as doing any more work in the coal
field of Kentucky is concerned. They are ruined
page 2702 } so far as doing any further work in Eastern Kentucky or West Virginia is concerned. What do

you think will happen to them if they go to Pennsylvania or Illinois or down in Alabama where my friend, Colonel Harris, hails from? I say they have suffered great damage and wrong in their business reputation.

They say if Laburnum had been the low bidder they would have gotten the job. What did Salvati say? Salvati said "I was going to give it to you regardless of the other things." I think I might say this right now. I know how hard it is to remember the testimony of witnesses. Salvati's deposition is short. It was given on two occasions. If you want it, ask for it to be sent to the jury room to you. So far as we are concerned anything that has happened in this case, exhibits, transcript, evidence, anything is at your disposal. You might, for instance, want to be reminded that Haslam, the superintendent there, who left on his vacation while the going was good, said that two or three men down there told him they were scared to go to work.

You see there is no order in what I am saying, but there is truth in it. Let me come back to some of the things that Bert Preston said. I refer to page 860 of the record.

"By Mr. Robertson:

"Question: Mr. Preston, you testified yesterday that after you elbowed your way into the toolhouse, and page 2703 } when Arnett called Hart a God damned liar, that that was about as tight a situation as you were ever in in your life."

"Answer: Yes, sir."

Then there were some objections.

"Question: Why did you tell him you would honor a picket line?

"Answer: It was my only way out."

"Do you think they had him on the spot?"

"It was my only way out."

"It was the tightest situation I have ever been in in my life."

"Question: As you understand picket line, was what he had out there a legal picket line?

"Answer: No, sir.

"Question: Why?

"Answer: He didn't have anybody on the job."

Now I turn to page 864 of the record:

"By Mr. Robertson:

"Question: Based on what you heard, what you saw, and what you did, and what you know, there at the job site on the 26th day of July, 1949, did the A. F. of L. men quit on account of the picket line, or because they were scared to work?"

There were some objections by Colonel Harris and the Court said to answer the question.

"Answer: It was through fear that we quit, page 2704 } instead of the picket line."

You remember, my friends came in with a tremendous to-do about the Virginia Mechanical Corporation, which is organized to do the plumbing and electrical work for the Laburnum company, and Coleman Andrews says it is sound accounting practice to lump it all together with Laburnum, and Mr. Holt said it was not. You can take it, there it is wide open, whichever way you choose to take it.

So when they broke it down and they separated, they found that if you include Virginia Mechanical Corporation, you get a profit of \$58,700 some dollars, and if you exclude Virginia Mechanical Corporation it cuts it back to \$56,000. If you look at Instruction J, subsection (e) it says you can either throw them all together or separate them and treat them separately or pull them out as you want. Instruction J, subsection (e).

Did you notice this? Did you hear Freddy Pollard say anything about punitive damages? Did you hear Colonel Harris say anything about punitive damages? Did you hear Mr. Mullen say anything about punitive damages? I tell you that one of the main purposes of this case is to make a demonstration and inflict a punishment and make an example of all three of these defendants, and just as you say of an individual, the higher and more powerful and more dominant an organization is, the more blame-worthy it is, and the page 2705 } more drastic the punishment should be. Suppose

that my cook goes up in my bureau drawer and steals \$50. She is blameworthy. She is ignorant, she has no education, she has been denied all opportunities in life, and that should be considered in meting out her punishment. Suppose I, who by mere accident have been given privileges in life, suppose that I embezzle or steal or murder or rape, I think the higher the station the greater the punishment should be for an example and also for punishment.

Now I am going to tell you something else. Colonel Harris called this a puffed-up case. Do you think it is a puffed-up case to Laburnum? Do you think it is a puffed-up case to

those men who had the temerity to come in here and *temerity to come in here and testify* for Laburnum? Do you think it is a puffed-up case to the men who came in here, who are subject to the discipline of the membership of these three defendant unions? Do you think it is a puffed-up case to the three defendants in the view they seem to be taking of it?

Colonel Harris talked something about Trimble. I have forgotten what he said, but Trimble was father and son, and the father was the man, I don't think they called him on the stand, who had one eye. They testified for us, both of them. The father's nickname is Peewee. I think I asked him when he was on the stand, "You are not young. page 2706 } You have no physique. What were you doing in the toolhouse if it was so hot in there?"

He said, "One reason, I was an officer of my union, and another reason, my boy was in there and I was trying to help him out of a jam." They didn't tell you about the jam in there on that. They just told you something else that Peewee said.

I have a few more notes here about what Mr. Mullen, I believe it was, had to say. He talked about McClellan. They tried to laugh that off. You remember, McClellan was the redheaded fellow that worked on the high line. I think he got \$2.25 or \$2.50 an hour. He looked like a man able to take care of himself all right, to me. He said, "No, I wasn't scared," and I don't believe he was, just like I don't believe Bryan was scared, but he said—he didn't say it like Mr. Mullen said it, and I can't say it like he said it, but you heard him, "Sh-h, sh-h, trouble, trouble!" Do you think that was a fake, that that was a brushoff?

McClellan also said that at that union meeting in Paintsville some of the men said they were scared and they weren't going back to work, and I think he said that Bert Preston said that it wasn't safe for them to go back to work. Remember the testimony. Preston said anybody who went back there ought to pack not less than a .38.

They talked about Jack Patrick here, this A. page 2707 } F. of L. steward on the job. Jack Patrick said also, I thought it was unsafe there and dangerous to work, and I ordered the men off the job for that reasons."

I think I have demonstrated about the strike, from the provisions of their own rules and regulations, from their own sworn answers, from their own picket line. When they talk about this puffed-up case, what do they try to work it around to? They try to work it around that "If Bryan had gone ahead and recognized 15 or 16 common laborers, and done

what we told him to do, everything would have been all right." Do you think you can boil this case down to any such proposition as that? I say without any sacrilege and without any levity, that when they were talking that way I remembered the story of one who was tempted in the wilderness and they took him up to a high mountain and showed him all the kingdom of the earth, and part of it might have been the coal fields of West Virginia with the construction work, and part of it might have been the coal fields of Kentucky with its construction work, and part of it might have been Pennsylvania and Alabama or whatever you want to do, if you will fall down and worship me. He said, "Get thee hence, Satan."

I leave it to you who you compare Satan with.

They can't twist this thing around. They cannot twist this thing around to David Hunter, who didn't come
page 2708 } here to say a word to you, that in his talks with Bryan he said, "If you get any more work out here we are going to do our best to organize in a peaceful, lawful way."

You know and I know that the only fair summary of what Bryan said is that David Hunter said it and Hart said it and everybody who has spoken for these defendants before this suit said it, "As an American citizen you can come and bid if you want, but if you come out here and work in our territory, you have got to join our organization, and if you don't, you don't come, and if you do come, we will run you out by whatever means is necessary to do it."

If Your Honor and gentlemen of the jury please, I am not going to take all of my time. I have covered this case as well as I know how. I hope I have brought back to your memory some phases of it that may help you to recall the whole picture that has been unfolded here. I have said that under the instructions of the Court, you are free—

"The court instructs the jury if you believe from the evidence that the plaintiff is entitled to recover compensatory damages—"

Bear in mind I am talking only about compensatory damages.

"—then in order to determine the amount of such damages you should consider any actual loss to the plaintiff of—

"(1) Profits under its contract dated October
page 2709 } 15, 1948, with Spring Fork Development Company, provided you believe from the evidence

that such profits are reasonably certain as defined in other instructions;

"(2) Profits the plaintiff might have realized from alleged promised cost plus 5 per cent contracts with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence that such properties are reasonably certain as defined in other instructions;

"(3) Any loss as defined in other instructions to plaintiff for destruction of its business connection with Island Creek Coal Company, Pond Creek Pocahontas Company and their associated and subsidiary companies, provided you believe from the evidence such profits are reasonably certain as defined in other instructions;

"(4) Any loss to plaintiff from impairment of plaintiff's business reputation.

"And you should return your verdict in such amount of compensatory damages as defined in other instructions on damages as will fairly and fully compensate the plaintiff for any of the aforesaid losses the plaintiff has actually sustained as a proximate result of the wrongful acts of the defendants or any of them.

"Punitive damages may be given in the discretion of the jury, not solely as compensation, but rather with
page 2710 } a view to the enormity of the offense to punish
the defendant, and thus make an example of him
so that others may be deterred from committing similar offenses. Punitive damages may be given in the discretion of the jury where a wrongful act—" Just think of Hart—"where a wrongful act has been accompanied with circumstances of aggravation, or committed in a high-handed and threatening manner or maliciously and with a design of injuring plaintiff in its business, or where the wrongful act is accompanied by insult, indignity, oppression or threats, or where the wrongful act is committed in a manner so wanton or reckless as to manifest a wilful disregard for the rights of others. In all such cases the jury may assess the damages at any sum which you may believe from all the evidence in the exercise of sound discretion the plaintiff ought to recover, not exceeding the amount claimed."

The amount claimed here is \$500,000, and we are not limited to what we put it as broken down in the itemized statement there. You can award it in any amount you deem proper up to \$500,000.

I will never again, probably, try another case like this. We will never again, you twelve gentlemen and I, be with twelve

on the jury and me speaking to you again as I am now. But before I close my case there are a few things that I cannot find it in my heart not to say.

page 2711 } I wish, after all this puffed-up case, this lack of threats, intimidation, force and violence, danger, this laughing it off, I wish in the face of what has been said about that to pay my tribute here to Ham Bryan who, as I said before, is worthy of the rock from which he is hewn. He has a stout heart—

Mr. Mullen: I object, Your Honor.

The Court: I don't believe you need to go into that.

Mr. Robertson: I don't think you have liked any of it. I will leave that out. I will say this: I will say this and and if they don't like this let them stop it. That I feel that I speak here not only for this plaintiff, but I think that this case is a test case and a beacon light of this old Commonwealth of ours, and I think it is going to be flashed from one end of this land to the other. I speak for far more than for the sum of \$500,000. I speak for far more than the Laburnum Construction Corporation. First of all, I speak for my dead partner and dear friend, Norman Flippen, from whom I inherited this case. And I speak also for those men who came here belonging to a minority group from Kentucky who had the temerity and the hardihood to come here and tell the story which they did. I speak in behalf of the men that live in the far reaches of those Kentucky hills, and I think I speak also for the men who came here and testified against this plaintiff

page 2712 } because I believe they live under the shadow and the threat and the iron control of a despotic "one organization" from which they should be freed. I believe that this Commonwealth that we love was one of the very first—

Mr. Mullen: He is getting away off there.

The Court: I think you had better stick to the evidence.

Mr. Robertson: You don't seem to like it. I interrupted you. That is all right. I will say one more sentence and then I will quit.

I will say to you, return your verdict for whatever compensatory damages in the different categories the proof makes you feel in your heart and mind you are justified in returning, and then I say to you that whatever the amount of that damage is, whether it be great or small, I ask you to add to it a sum of punitive damages which brings the sum total of your award to \$500,000. I ask you to make that the challenge and the answer of this jury in this state to any such insolent, arrogant, tyrannical behavior as has been pulled against this plaintiff here.

The Court: Gentlemen of the jury: The case is now in your hands. The first thing you do is to elect a foreman. After you have reached a verdict, if you will advise the Court, the Court will assist you in putting the verdict page 2713 } in proper form. When you have reached a verdict here is a buzzer for you to ring, and the sheriff will then come in and we will receive the verdict. The Courtroom will be excluded, Sheriff. The jury will deliberate in the courtroom. Everyone else will leave.

(Whereupon, at 4:25 o'clock p. m. the case was submitted to the jury.)

(At 11:55 o'clock p. m., the Court, Sheriff and Reporter returned to the Courtroom and, in the presence of the jury, but in the absence of counsel, the following proceedings were had:)

The Court: Adjourn Court until tomorrow morning at 12:01.

(Whereupon, at 11:55 o'clock p. m., Friday, February 16, 1951, a recess was taken until the following day.)

(At 12:01 o'clock a. m. Saturday, February 17, 1951, the Court reconvened, pursuant to recess.)

The Court: Call the roll of the jury.

(Roll call of the jury.)

The Court: All right, gentlemen.

(The jury resumed its deliberations.)

(At 12:25 o'clock a. m. the Court, Mr. Robertson, Mr. Mullen, and the Reporter returned to the Courtroom and the following occurred:)

page 2714 } Mr. Phil J. Bagley, Jr. (Foreman of the Jury): Gentlemen, we have reached a verdict. We understand there is a form to be filled out and that is what we are requesting at this time, the form that we may give our verdict in at the proper time.

The Court: You tell in your own words what your verdict is and then I will retire to Chambers with counsel and write

the verdict according to your verdict, then you sign it, if that is your verdict.

Mr. Bagley: "We the jury find for the plaintiff and believe that all the defendants are jointly and severally liable. We set the damages as follows: Compensatory, \$175,437.19; punitive damages at \$100,000. A total of \$275,437.19.

The Court: All right. You gentlemen just wait here.

(At 12:26 a. m. the Court and counsel met in Chambers and the following occurred:)

The Court: Mr. Dudley, suppose you read back what the jury had to say.

(The statement of the Foreman of the Jury, appearing above, was read by the reporter.)

(Discussion off the record.)

The Court: As I understand, there is no objection to the form of the verdict.
page 2715 }

Mr. Robertson: That is correct.

Mr. Fred G. Pollard: That is correct.

Your Honor, to save time we move the Court—

Mr. Robertson: If I were you I would wait for the verdict.
Excuse me.

Mr. Fred G. Pollard: I ask the Court's permission to poll the jury before the jury is discharged, to determine in connection with our motion for mistrial based on the editorial from the News Leader, to determine whether or not any of the jurors have read that editorial.

Mr. Robertson: If Your Honor please, we absolutely oppose that under the Virginia decisions upon the ground that they waived the right to do it. Before the argument of this case was started this morning the Court asked counsel if it wished the jury polled, and counsel declined to answer until after they went into a conference, and then they came back an announced through Mr. Mullen, the senior counsel, that they did not wish the jury polled. Having done that, they waived the right to have it polled, and they cannot now wait until after an adverse verdict against them and then come in here and try to take advantage of something that they waived and thereby get two bites at the cherry. The purpose this morning was to waive it in order not to antagonize the jury, and now tonight they are making an attempt to take a fresh

crack at something after they got an unfortunate page 2716 } result for them.

Mr. Allen: Furthermore, they cannot inquire into the reasons for grounds for the verdict after the verdict has been rendered. The jurors cannot be interrogated on that subject.

The Court: The motion is overruled, Mr. Pollard.

Mr. Fred G. Pollard: We except.

At 12:31 o'clock a. m. the Court reconvened, and the jury returned a verdict as follows:

"We the jury on the issues joined find for the plaintiff against all three defendants jointly and severally and assess against all three defendants jointly and severally and assess compensatory damages and \$100,00 punitive damages."

The Court: All right.

Gentlemen, I want to thank you for your deliberations. I know it has been a sacrifice to each and every one of you to serve four weeks straight on the jury. I want to assure you that I deeply appreciate it. On behalf of the Commonwealth and the City of Richmond I also wish to thank you. You are excused.

(The jury was excused and left the courtroom.)

Mr. Fred G. Pollard: May it please the Court, we ask that the Court withhold entering judgment on the verdict for a period of two weeks in order to give the defendants time to confer with its counsel in connection with any motions that it might desire to make as to the verdict.

The Court: Your request and motion are granted, Mr. Pollard, and the Court will not enter judgment on the verdict at this time.

Mr. Fred G. Pollard: We of course under that ruling have reserved the right to make any such motions that we might desire to make, sir.

The Court: Yes.

Mr. Allen: Your Honor, don't you think in that situation that an order should be entered receiving the verdict but entering no judgment upon it?

The Court: I don't see any objection to having an order receiving the verdict if you think one is necessary.

Mr. Allen: I think that should be done, sir.

The Court: Enter an order receiving the verdict but no judgment entered on the verdict at this time.

Mr. Mullen: Do we need an order granting us the two weeks' time?

Mr. Allen: No, you don't need that.

The Court: I don't think so.

Mr. Mullen: If anything should happen in the meantime that would not affect it.

The Court: I don't think so. The minutes will show that I withheld entering the judgment at this time page 2718 } and the record will show it.

Mr. Robertson: You are not threatening the Court, are you, Mr. Mullen?

Mr. Mullen: No, I am not threatening the Court.

The Court: Adjourn Court, Sheriff, until Monday morning at ten o'clock.

(Whereupon, at 12:40 a. m., Saturday, February 17, 1951, the Court adjourned.)

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PROCEEDINGS ON MOTION TO SET ASIDE VERDICT.

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Received & filed Aug. 16, 1951.

Teste:

WILBUR J. GRIGGS, Clerk
By E. M. EDWARDS, D. C.

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ARGUMENTS ON DEFENDANTS' MOTION TO SET VERDICT ASIDE AND GRANT NEW TRIAL.

Richmond, Virginia
May 18, 1951
9:30 a. m.

Before Honorable Harold F. Snead, Judge.

page 2 } Appearances: For the Plaintiff—Archibald G. Robertson, Esq., George E. Allen, Esq., Francis V. Lowden, Jr., Esq., and T. Justin Moore, Jr., Esq., of counsel.

For the Defendants—James Mullen, Esq., M. E. Boiarsky, Esq., Fred G. Pollard, Esq., Willard P. Owens, Esq., and Robert N. Pollard, Jr., Esq., of counsel.

Mr. Fred G. Pollard: May it please the Court, I should like to request that Mr. Willard Owens of the bar of the District of Columbia, and Mr. M. E. Boiarsky, of the bar of the State of West Virginia, be admitted to practice in this court.

The Court: It is a pleasure indeed to have you gentlemen practice in this court. If you will come around, the clerk will administer the oath.

(The oath for admission was administered.)

Mr. Fred G. Pollard: Your Honor, the defendants have a motion as to the jurisdiction, which was filed returnable to 9:30 this morning.

Mr. Allen: I did not hear that. What was your last word?

Mr. Pollard: That the motion was returnable for page 3 } 9:30 this morning. We will like to have that heard first, and we would also like that not to cut down the time that has been allotted for argument of the motion to set the verdict aside.

Mr. Robertson: If Your Honor please, that motion, which we do not think affects the jurisdiction of this Court, was served on us on April 30. We made no point of the time and we filed a memorandum in opposition to it which was filed in here May 15, I think. Apparently Mr. Fred Pollard hasn't gotten in step with Mr. Robert Pollard. Mr. Robert Pollard called me at my office and the substance of our conversation was this—that the plaintiff made no objection at all on account of whatever time that motion was filed. And we understood, and I told Mr. Pollard, that we didn't expect him to make any point of the time May 15 when our memorandum in opposition was filed. I understood him to say that no point would be made of those considerations to either side.

Then he asked "What about the time for argument?" I said then, and say now, the Court has allowed three hours to the side for this argument, which does seem to me more than ample for anything that could be said here helpful to the Court today. As I said to Mr. Robert Pollard, every question now before the Court, covered in these memorandums which were filed here, was argued *ad nauseam* during the page 4 } four weeks of the trial and during the six or eight pretrial conferences.

I also told Mr. Robert Pollard it was all right with me if he got additional time, provided the amount of it was agreed

to in advance, and provided we go on and get through with this thing at this one hearing without adjourning this matter over.

I am going to ask that the two things be argued together and go along here; and if they want to present their argument on the motion first and follow it up with whatever they want on their motions to set the verdict aside, and get along and get through with the whole thing at once, I do not see any reason to break this up in segments and drag it out longer.

Mr. Pollard: Your Honor, my understanding of what Mr. Robertson told my brother was that he did not care what happened, as long as we finished.

Mr. Robertson: That's substantially true.

The Court: The Court would like to finish this today. How much time would you want, Mr. Pollard?

Mr. Pollard: Forty-five minutes, Your Honor.

The Court: Would there be any objection on your part for you, in opening your argument, to discuss your motion, and then proceed to discuss the motion filed to set the verdict aside?

page 5 } Mr. Pollard: Your Honor, in that connection,

Mr. Boiarsky is going to argue the motion as to the jurisdiction. Mr. Mullen has prepared an argument to open.

The Court: I will grant your request. We will hear argument on the motion as to jurisdiction first.

Mr. Pollard: That will not interrupt the three hours?

The Court: No, but I would request that if you could hold the three-hour argument down to less time that you do so.

Mr. Pollard: Thank you, sir.

The Court: Mr. Boiarsky?

JURISDICTION.

Mr. Boiarsky: If it please the Court, there comes on at this time the motion of the defendants to enter judgment for the defendants, and each of them, and to dismiss the plaintiff's notice of motion for judgment on the ground that the Court is without power, authority, and jurisdiction to herein determine the issues in this action because such determination would be repugnant to, and in violation of, the Labor Management Relations Act of 1947; federal statute being 61 Statutes 136, chap. 120, secs. 1 and following, Public Law 101, and to Article 1, Sec. 8, of the Constitution of the United States.

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page 21 }

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Mr. Lowden: If Your Honor please, I think it would be well, at the outset, to remind the Court that we did not bring an action alleging unfair labor practice. We did not bring an action in any way based upon the National Labor Relations Act. Our action was predicated upon the law of tort—the law of tort of the State of Kentucky. The defendants in their Answer to the action agreed with us that is what this action was.

I think the Court should fully understand what the gentleman is urging here. His proposition is this—that the State of Virginia has nothing to do with assault and battery if there is a labor union involved; the State of Virginia has nothing to do with dynamiting people's homes if it is an outgrowth of a labor dispute; the State of Virginia has nothing to do with the mass picketing; that the Virginia court in the *Luray Tannery* case had no authority whatsoever to take any action despite the fact that that case went to the Supreme Court of the United States and our court was upheld. He is saying to you that the injunction—I think it was in this court—that was issued a month or so ago, that you had no jurisdiction to do that. And he is saying that all of our courts are powerless to protect adequately the citizens of Virginia for, as he says, assault and battery, and matters of that kind. That is the issue he seeks to raise.

There are several reasons why I think that the contention, particularly in this case, is preposterous. But before I get to those, there is a matter of time that I think I should mention. Your Honor will recall that this case was started early in December, 1949. The matters on which the action was based occurred in July and August, 1949, nearly two years ago. The defendants had from December until, I think, sometime in October to file their Answer in this case. As the Court knows, they have adequate counsel, they've got a roomful of them, as a matter of fact—all competent. They had no reason, as I see it, if you take their own statements at face value, for they contend that the only remedy was before the National Labor Relations Board.

The statute of limitations, in such case, is six months, which had expired at the time almost the Notice of Motion was filed in this case. So they had no reason to string it out. And I am sure these gentlemen are well aware, or should have been, such an argument, if valid, existed. So what they have done is permitted this case to drag on over a year. They have

taken up, I would say, at least two months of the Court's time on an eight-hour a day business basis; they had a jury of very substantial citizens sit in these chairs for three weeks taking their time up; and then they wait until two month after the jury's verdict and come in and say, "Oh, the Court didn't have jurisdiction."

Personally, I think that demonstrates one of two things—either they had no confidence in this point and they are now raising it merely as a last resort to try and inject into this case a federal question, primarily, I would think, for the purpose of delay, or they were trifling with the Court and the Court's time. I think the defendants are estopped from raising any such motion at this time. I don't think it is a jurisdictional question, in the first place, because the action brought before this Court was a tort action and Your

page 24 } Honor had jurisdiction and power over that.

The defense that they raise in this motion is not one of jurisdiction in the sense that the Court had no power. It did have power over the tort. And they submitted to that jurisdiction in their Answer, both in person and as to the subject matter. I think that the rule is that having put yourself in that position you are estopped to raise anything but pure jurisdictional points, and I do not believe that this one is; and, therefore, it is too late to raise it. But that is a preliminary matter and I will now address the main issue that they raise.

As counsel has pointed out, prior to 1947 the old so-called "Wagner Act" had no provisions dealing with unfair labor practices by unions, and the Board, which was the trier of most issues under the Wagner Act,—and the word "exclusive" was used in that Act, incidentally,—would be faced with this proposition. There would be a representation as to which union represented a company's employees. If management coerced the people, employees, it could throw the election aside, but if the union went out and coerced them, the Board had no interest in that because there was nothing in the Act to cover that. So it worked in a very one-sided way. Then in 1947, after it became apparent that the old Wagner Act was a very one-sided proposition and was not work-

page 25 } ing as it should, the Congress amended that statute and passed additional legislation to cure some of the evils that had cropped up during the administration of the old Wagner Act, and they did include in the new Act a section 8 (b) which proscribes certain practices on the part of unions and states that they shall be unfair labor practices.

For the purpose of this particular part of my argument, I will assume that the acts that occurred out in Breathitt

County, Kentucky, were unfair labor practices. So that the only question is whether or not in enacting Sec. 8 (b) (1) of the National Labor Relations Act, as amended, the Congress deprived employers of their right to redress, resulting from destruction of their property, and whether or not that section, standing by itself, deprives the State of Virginia, the State of Kentucky, or any other state, from dealing with practices of violence. I think it is almost obvious that it didn't.

I think the rule of law is—and we will agree that in some cases the Congress can, and has, preempted fields. I think the power of Congress to do that, if that is what it intends to do—we wouldn't argue about it; I didn't do it here—where there is a case of traditional state sovereignty, in the field of state action, a field in which the Congress has the power to legislate, and the field in which the Congress does
 page 26 } subsequently legislate, the test of whether or not they have preempted that field is a simple one. In order to do it, they must clearly have intended so.

In enacting Sec. 8 (b) (1), the Congress did not intend to preempt the State of Virginia or the State of Kentucky from dealing with violence, assault and battery, and other matters. And if you look at the legislative history of the Act, it couldn't be stated in more plain language.

Back in 1947, early in the year, when the matter of amending labor disputes first came up—not amending labor disputes, but amending the labor Act first came up, a hearing was held and they called in a man named Paul M. Herzog, who was then Chairman of the National Labor Relations Board, and they asked his opinion as to various amendments which were being considered to the National Labor Relations Act. One of them was legislation substantially similar—in fact, I think it was word for word—to Sec. 8 (b) (1); namely, that it is an unfair practice to interfere with, restrain, or coerce employees in rights guaranteed them under the Act. Mr. Herzog made it perfectly plain that he thought any such legislation would be unfair to the unions because it would create two penalties
 page 27 } against them—one under the state law and one under the Act. Then he went on to say it was ridiculous for the Congress to have our little Board to try to supervise the entire country in matters of violence, police matters, and he recommended against the provision.

Later on in 1947, different bills were introduced into the two houses of Congress, and these two bills ultimately became the Taft-Hartley Act. In the Senate, it was Senate Bill No. 1126. And in the Senate Committee on Labor and Public Welfare, the part of the Taft-Hartley Act with which we are here concerned came up as an amendment, and it was an amendment

supported by Senators Taft, Ball, Donnell, Jenner and Smith. They said that this Sec. 8 (b) (1) ought to be in the law. Then if you will look on page 10 of the brief, you will see that they said this:

"Some of these acts are illegal under State law, but we see no reason why they should not also constitute unfair labor practices to be investigated by the National Labor Relations Board."

Should not also be. They are the gentlemen who introduced this particular language in the bill. The bill culminated into the Taft-Hartley Act. Its counterpart in the House was H. R. 3020. And there were differences in those two bills, and after each House had passed its own bill, they had to go to conference and the conference committee had to get the two together, and subsequently it was passed.

In the conference report on that bill, the people page 28 } who are responsible for it made these statements—that in Sec. 10, where it says that the Board's power to handle unfair labor practices shall not be affected by other remedies, they stated this:

"By retaining the language which provides the Board's powers under Section 10 shall not be affected by other means of adjustment, the conference agreement makes clear that when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies."

There couldn't be any point to that.

The particular question that we are here discussing has not yet been before the Supreme Court of the United States, but there have been contentions made in that court concerning matters in the field of labor relations. There have been contentions made that the states cannot do anything which conflicts with federal legislation. In the brief, I have briefly summarized the nine Supreme Court cases dealing with the general subject of conflict between federal and state legislation in the field of labor relations. In all of the cases so far decided by the Supreme Court,—and they have all dealt with state legislation rather than torts,—there has been a conflict between what the state wanted to do and what the federal law prescribed.

page 29 } For example, in the most recent case, was one dealing with the Act in Wisconsin, similar to our

Public Utility Labor Relations Act. In the Wisconsin Act, they said that employees of public utilities cannot strike—period; whereas, the National Labor Relations Act says they shall have the right to strike. Clearly, in a case like that, assuming it to be a matter affecting commerce within the power of the Congress, the federal legislation is the one that governs. But we are not confronted with that case; we have no conflict here. Even assuming the unfair labor practices, there is no conflict.

The Circuit Court of Appeals, for the Fourth Circuit, had something to say about the contention being made here this morning. And I am not going to take up much of your time. I have it set out in the brief in full. But this is their conclusion. They discussed Sec. 10 and then came down and said this, after reading that same language:

“The conference agreement makes clear that, when two remedies exist, one before the Board and one before the courts, the remedy before the Board shall be in addition to, and not in lieu of, other remedies.”

“The last sentence of the quotation does not mean, of course, that a general remedy in the courts was being given by the act, but merely that an option existed where a remedy in the courts was given by the act, or existed otherwise.”

page 30 } So that our Fourth Circuit Court, although not called upon precisely to pass on the point made it plain what they think of such a contention as we have here.

Similar contentions as the ones we have been hearing this morning have been made in other cases, and we have cited several in our brief. I would like to read just one short paragraph from a case in New York:

“The defendant moved to dismiss the complaint upon the ground that it was insufficient upon its face and also upon the ground that the Court had no jurisdiction of the subject matter of the action. The second ground urged for dismissal may be readily disposed of. Of course, this Court has no jurisdiction to entertain proceedings to remedy alleged unfair labor practices under the National Labor Relations Act. Exclusive jurisdiction with respect to such matters is vested in the National Labor Relations Board. However, the complaint is not based upon alleged violations of the Federal statute, but is based upon common law tort principles. The fact that the grievance complained of in a common law tort action may also constitute an unfair labor practice under the Federal statute does not deprive the state courts of jurisdiction over

the common law tort action. The motion for dismissal for lack of jurisdiction is therefore denied."

By way of summary of that point, I would just like to review, briefly, three things. When suing for common law tort, the ruling principles of law is in order for federal
 page 31 } legislation to knock out such an action, its intent to do so must be plain. The federal intention, as read to you, is clearly that where two remedies exist, one before the courts and one before the Board, the remedy before the Board is in addition to, and not in lieu of. And, finally, it is preposterous, it seems to me, to be here now, after four years under the Taft-Hartley Act, when there have been hundreds of cases, a great many in Virginia, where the remedy we seek here now has been in effect given by our courts—under circumstances perhaps not so outrageous, but at least similar.

Coming down to whether or not what happened in Kentucky, what we are suing for, is also an unfair labor practice under the National Labor Relations Act, the National Labor Relations Act says that it shall be an unfair labor practice to restrain or coerce employees in their rights guaranteed under Sec. 7; and their rights are to form, join a labor organization, or so forth, or not to join.

This case before the Court this morning is not a case seeking damages for wrong to the employee. We are suing them for what they did to us—and that isn't mentioned as an unfair labor practice in the National Labor Relations Act. The Sec. 8 (b) (1) was a protection to employees and not for employers. Our case is just a plain common law tort
 page 32 } to an employer that arises out of destruction of his property, a property interest in Kentucky, I say by force and violence; that such action of tort law is not, and was not intended to be, covered by the National Labor Relations Act.

It is a peculiar thing, the claim of the union in this case has been that they represented these people. That is how it got to be a labor dispute. The United Mine Workers wanted to represent our employees. If this was a labor matter within the meaning of the National Labor Relations Act, that Act provided them a way to go and be certified so that if they represented these people we would be compelled to bargain with them. Why didn't they do it? Because they hadn't complied with the Act and, therefore, no representative question affecting commerce could arise because the union wasn't qualified under the National Labor Relations Act. Sec. 9 (h) says the Board shall not even investigate a question of representation where the union has not filed anti-Communist affidavits.

So we had no federal question of representation and they could not raise it because they had not qualified.

One last matter I should like to comment upon. In order for their argument to be before the Court, it must appear in the record that this was an unfair labor practice affecting commerce. They certainly could not contend that page 33 } if this was an intrastate and local matter the National Labor Relations Act, in proscribing unfair labor practices affecting commerce, certainly would have nothing to do with one affecting commerce. Not only wouldn't it have anything to do with it, but Congress wouldn't have any power to legislate in that field. In our case, it seems to me that the defendants were very careful—at least most of the way through it—that it would not appear in this case whether or not interstate commerce was affected by this matter that occurred in Kentucky. And I say to the Court that there isn't any evidence here that any affect on commerce would have resulted. Therefore, there is nothing in the record to show that this would have been an unfair labor practice within the meaning of the National Labor Relations Act. Since nothing appears to that effect, his major argument falls down because he hasn't even gotten an unfair labor practice within the meaning of Sec. 8 (b) (1).

So, in summary, I say, *first*, they are too late; *second*, we do not have a factual situation that comes within the meaning of Sec. 8 (b) (1) for two reasons: (1) We are not suing for a wrong to the rights of employees; (2) The matters alleged do not affect commerce; and, *third*, even if they are an unfair labor practice, or could have been so called under that section, the power of this Court is not in any way affected page 34 } by Sec. 8 (b) (1) and the common law remedy for tort for acts of violence remains just as it always has been.

Thank you.

The Court: Mr. Boiarsky?

Mr. Allen: May it please Your Honor. I suppose this gentleman has the conclusion, and I should like to make a few observations here, sir. I shall not repeat, but shall undertake to supplement what Mr. Lowden has so well said.

I think considerable light may be thrown on this subject by approaching it from the angle of the importance which the common law occupies in our system of jurisprudence. This great body of the common law consists of broad and comprehensive principles created by judicial decision based on justice, reason, and commonsense. These principles have been determined by the courts, by the needs of society, and are

susceptible to adaption to new conditions, usage, and relations as civilization progresses. Flexibility and capacity for growth and adaptations is the peculiar boast and excellence of the common law—that the common law provides a remedy for every wrong. It is but the crystalized conclusion of the judges arrived at from applying the principles of natural right and justice to facts actually experienced in the cases. And you might say it is but an accumulation of the wisdom page 35 } of the ages.

The common law is so important in our system of jurisprudence that the courts everywhere—the United States courts and the state courts—laid down this doctrine, which is not disputed by any court, that no statute passed by any legislative body has the effect of repealing any part of this great body of the law unless it expressly says so, or the implication is so strong that it is absolutely necessary.

We not only have the common law as a part of our system of jurisprudence in Virginia adopted by statute, but in Kentucky they have adopted it by constitutional provision. So where this tort arose the common law of England prevailed by constitutional enactment.

When Congress came to enact these labor laws, those Congressmen are presumed to know that the common law existed in the various states, and that unless something was put in the labor laws that repealed the common law, the common law remained in effect. These laws, as amended by the Taft-Hartley Act, create the National Labor Relations Board, and they give to the Board broad investigatory powers. The Act creates offenses in the industrial word known as “unfair labor practices”. It defines those practices on the part of the employer and defines those practices on the part of the employee. The Labor Board is given the authority page 36 }

of unfair labor practices and to enter cease and desist orders to compel labor or management, as the case may be, to desist from following those practices. The only court that has any jurisdiction in the premises is the United States Court of Appeals in the proper district to enforce the orders of the Labor Board.

Sec. 303 (a) of the Taft-Hartley Act declares, for purposes of that section only, what constitutes unfair practices; and section (b) of the Act provides that any person injured in his business or property by reason of any violation of section (a) may sue not only in the district court of the United States but any other court having competent jurisdiction of the parties—that's the first time that appeared in the labor acts—

and shall recover damages by him sustained. Now this section provides that it shall be subject to Sec. 301.

Sec. 301 provides for the bringing of suits for the violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. That section provides that both labor organizations and employers shall be bound by the acts of its agent, and for the purpose of determining whether any person is acting as agent, the question of whether the specific acts performed were actually authorized or subsequently ratified shall page 37 } not be controlling.

Nobody has here read these sections which are so vital to this case, and I might read them at this point. Sec. 301 (a) provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Then they go on with the further provisions there about the conduct of the suit, and it winds up with that provision about agency.

Now you turn back to Sec. 303 (a) and you find there:

"It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—"

See how it is limited?—

"* * * where an object thereof is—

page 38 } "(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;"

There is no use to read the rest of those in detail, but the heading of it indicates "BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS". There is nothing in any of those sections that applies to this case. That is the section which winds up

"Whoever shall be injured in his business or property by reason or any violation of subsection (a)"—

which is the one I read—

"may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained * * *"

While I am here, however, I will read Sec. 10, and this is the only respect in which I am going to repeat what Mr. Lowden said. This is in the Taft-Hartley Labor Management Relations Act, of 1947. It tells you what the Board is empowered to do.

page 39 } "Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8)"—

which is the one over here that defines unfair labor practices, both on the part of the employer and on the part of the employee.

Now here is the language that was in the other act, which is excluded from this Act: "shall be exclusive"; that is cut out of the Act and it reads:

"This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *"

This book is Gregory Katz on Labor Law, and he comments on that section at page 959 and says:

"The language of section 10 (a) of the former act that the jurisdiction of the Board shall be exclusive is omitted in the present act on the ground stated by the House conferees, that by retaining the language which provides the Board's powers under section 10 shall not be affected by other means of adjustment the conference agreement makes it clear that when

two remedies exist, one before the Board and one before the court, the remedy before the Board shall be in addition to, and not in lieu of, other remedies." (Not checked.)

Now going back to the question of the effect of the common law. If that provision had not been in the Act at all, and the other language had remained as it was, still page 40 } under the construction which the courts have placed upon the statutes which change or modify or tend to change the common law, the courts would still have said that this common law remedy was not affected. But with that in the statute, you cannot get around the proposition that the common law remains as it was.

Mr. Robertson: May I interrupt one minute? It has been called to my attention, Your Honor, that our 45 minutes are up at 11:15, and the other side has three more minutes out of their 45. My suggestion is that either side use what they want from now on, but it be charged against the other three hours.

The Court: Is that agreeable, gentlemen? In other words, each side will have three hours and 45 minutes.

Mr. Boiarecky: That is all right, except I believe Mr. Robertson is a little bit off of my time.

Mr. Robertson: I may have given you too much.

Mr. Boiarsky: I understand that I have about 10 minutes.

The Court: All right, you will have 10 minutes.

Mr. Allen (Con'd): In the famous case of *Erie v. Tompkins*, 304 U. S. 64, the court said (p. 78):

"Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest

page 41 } court in a decision is not a matter of federal concern. There is no federal general common law.

Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts."

In the later case of *Meredith v. Winter Haven*, 320 U. S. 228, the court held that *Erie v. Tompkins* did not merely free federal courts from the duty of deciding questions of state law in diversity cases but instead placed on them a greater responsibility for determining and applying state laws in all

cases within their jurisdiction in which federal law does not govern.

Now illustration after illustration could be made from the actual cases showing the application of the principle and how far the courts go in holding that the common law of a state is not affected by any legislative enactment either by the legislature of that state or by the Congress unless it plainly so appears. I will illustrate the application of the principle by reference to only one case, and I think this is a good application of it because the case was brought under the Federal Employers Liability Act, and the Federal Employers Liability Act, of course, as we all know, and as every case has held, creates a new right. We know that the law is, when a new

right is created, and the statute creating that right
 page 42 } and creating the remedy specifies the time within
 which the action must be brought, it must be
 brought in that time. It must be brought within that time. So the Act says that the suit must be brought in three years. There is no "saving" clause in favor of an infant whatsoever. In this case of *Scarborough v. Coast Line*, a boy seventeen years old was injured. The claim adjuster told him that he had three years after he got 21 to bring his action, and he waited until after he got 21 to bring his action, and the district court dismissed it on the ground that the limitation was three years and couldn't be altered by any misrepresentation like in an ordinary statute of limitations which goes to the remedy only, because in this case the statute went to the right. The Circuit Court of Appeals said no, it is part of the common law; that is a part of the common law, this matter of estoppel to plead the statute of limitations, and we are going to apply it to a federal statute. They are the only cases I will cite there.

When we come down to the labor acts here, I will hand you one of these books up while I am talking about it. Every argument that is made by my friend on the other side is disposed of, in my opinion, by the well considered case of *Thayer Co. v. Binnall*—there are two cases. I am going to read just
 page 43 } enough of the facts and then the reasoning to
 show Your Honor how applicable the reasoning in
 this case is to our case. These are suits in which the plaintiffs, Thayer Company and H. N. Thayer Company, seek to have the defendants, officers and members of Local 154, United Furniture Workers of America, C. I. O., enjoined from alleged unlawful conduct in connection with strikes at the plants of the respective plaintiffs. Now, mind you, this case was brought, Your Honor, in the state court and was removed to the federal court, and the motion was made in the

federal court to remand on the ground that the federal court did not have any jurisdiction but it was a matter for the state court. And it was remanded.

“The bills of complaint allege, in substance, that the plaintiffs have entered into collective bargaining contracts with the Thayer's Workers' Council and the H. N. Thayer's Workers' Council, as the collective bargaining representatives of the employees of the respective companies, that these contracts are still in force, and that the companies have no contracts with the aforesaid Local 154.”

That is exactly Mr. Bryan's case. He had entered into collective bargaining contracts with the A. F. of L. He had no contracts with these other labor organizations.

“It is alleged that Local 154 has injured the plaintiffs by calling a strike at their respective plants, by inducing employees of the plaintiffs to violate the existing contract page 44 tracts by engaging in the strike, and that this was done for the purpose of compelling plaintiffs to violate their contracts with the respective Workers' Councils”—

Mr. Bryan's case, compelling him to violate his contract with the A. F. of L.—

“and to enter into contractual relations with Local 154”—

in Mr. Bryan's case, enter into contractual relations with that organization out there—

“which has not been certified by the National Labor Relations Board as bargaining representative of plaintiffs' employees.”

What is the name of that outfit out there?—the United Mine Workers, United Construction Workers—they have not been certified as bargaining representatives. In other words, they sought to compel Mr. Bryan into relations with them when they had not been certified by the National Labor Relations Board.

“It is further alleged”—

which is the case in our case—

"that defendants, many of whom are not employees of plaintiffs, have engaged in large numbers in picketing, obstructing entrances to plaintiffs' plants, intimidating employees and others who wish to enter the plants, and have prevented trucks of public carriers from entering plaintiffs' premises."

Now coming on over here to discuss other see-
page 45 } tions that we have here before us for discussion:

"Section 301 (a) gives this court jurisdiction over suits for violation of contracts between an employer and a labor organization. But that is not the present case. Plaintiffs allege that no contracts exist between them and the defendants, hence they cannot be considered as suing for any violation of such a contract. Furthermore, plaintiffs do not now seek damages in their complaints. The gist of plaintiffs' complaints is not that defendants have violated any contract to which they are parties, but that they have unlawfully interfered to induce a breach of a contract between plaintiffs and the Workers' Councils. This is a distinct cause of action, and one over which this court is given no jurisdiction under Section 301 (a).

"Section 303 (b) gives this court jurisdiction over suits for damage to business or property resulting from violations of the secondary boycott and jurisdictional strike provisions of Section 303 (a). But the conduct of the defendants set forth in the complaints here does not involve a secondary boycott or a jurisdictional strike and is not such as to constitute a violation of Section 303 (a). It is true that it is alleged that Local 154 and its members, the defendants, have engaged in a strike against the plaintiff-employers here, and have encouraged others to do so. But this falls within the prohibition of the Act only when done for one of the objects enumerated in the section. There is nothing to indicate such a purpose here. Nothing appears to indicate any activity here for the
objects listed in Section 303 (a) (3) and (4) but
page 46 } defendants contend that the complaints allege unlawful activity for the objects named in Section 303 (a) (1) and (2). But there is no allegation here of any attempt to require any employer or self-employed person to join any organization. And insofar as the activities of the defendants have been directed toward the plaintiff-companies themselves, there is no indication of any purpose to require these companies to cease in any way from doing business with other persons. Sec. 301 (a) (1). The object of the strike is alleged to be to require bargaining with a labor organization not certified under the Act as the bargaining representative

of the employees. But it is the plaintiff-companies themselves and not any *other* employer who would be forced to bargain with the uncertified union. Sec. 301 (a) (2).

"The defendants would violate the Act if they induced or encouraged employees of any employer other than the plaintiffs 'to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services' with the object of forcing such other employer to cease to do business with the plaintiffs or with the object of forcing the plaintiffs (employers other than the employer of the employees thus induced to act) to bargain with the uncertified union. But the complaint makes no allegation of an inducement or encouragement of a strike of or of any concerted action by employees

page 47 } of any one except the plaintiffs. Defendants complain that such an allegation can be found in the statement of the complaints that defendants and their associates who are on the picket lines have refused to permit public carrier trucks that normally transport goods to and from the plants of these plaintiffs to enter upon the plaintiffs' premises. This is too vague a statement to be construed as an allegation of encouragement or inducement to action by the employees of such carriers, much less as an effort to encourage concerted action on their part. In the light of its context, the statement amounts to no more than a specific allegation under the general charge that the pickets have unlawfully interfered with free access to the plants.

"Plaintiffs in their complaints have nowhere expressly laid claim to any right or remedy given them by any federal law. They contend that their complaints are based solely on alleged unlawful interference with their contractual rights and right to do business as given them by the common law of Massachusetts, and that they ask only the remedy of injunction traditionally available to them under the equity jurisdiction of the courts of that state. A fair interpretation of their bills of complaint shows that that is the only cause of action which they purport to set forth. To construe these bills as stating a cause of action which plaintiffs may have under federal law, but which they have elected not to pursue, would be a tortured interpretation of them which I cannot adopt.

"Therefore, I conclude that the complaints do not state any cause of action based on the Constitution or
page 48 } laws of the United States and, in particular, on the Labor Management Relations Act of 1947. Diversity of citizenship being lacking, the case is not one over which

this court has jurisdiction, and the cases are remanded to the court from which they were removed."

I think that case, if Your Honor please, fits this case like a glove. It is identical in its facts except that in that case injunction was sought, and in this case damages was sought. I do not think that there is anything in this case in any way, shape or form, any way you go about it, by which it can be said that any other court, or any other tribunal, was given jurisdiction to the exclusion of this Court.

Supplementing Mr. Lowden in one respect there about the attitude of these gentlemen and the belated filing of their plea, I call Your Honor's attention to the fact that in one of the pretrial conferences, when the matter of instructions was discussed, counsel for the defendants insisted that the Kentucky law be given to the jury in the form of a Kentucky statute. Your Honor will remember the argument that we had upon that. Of course, they come back and say that consent cannot give jurisdiction of the subject matter; and we all know that if it is actually jurisdiction of the subject matter that is involved, and a court has no jurisdiction of the page 49 } subject matter before it, why you cannot give consent, nothing you can do can give the court jurisdiction. And the court, of its own motion, may say, "I haven't got jurisdiction," and throw it out, even though nobody raises the question. But that is not the case here, as Mr. Lowden pointed out. It is not a question of the jurisdiction of the subject matter at all, and the plea comes entirely too late.

Mr. Robertson: If Your Honor please, I just wanted to take about five minutes to relate what had been said here for a moment in the past.

Mr. Lowden, in his argument, said that there was nothing in this case to show that anything had transpired affecting interstate commerce within the meaning of the Act. It shows just the opposite. Your Honor will remember that the testimony was that the tippie never stopped a day, and that they made sure it would not stop a day, and that Hart said he didn't want to stop the tippie because he didn't want to get in bad with Tom Raney. Therefore, Mr. Lowden said that there was no evidence here that anything that was done affected interstate commerce. I say the positive testimony is that it did not affect interstate commerce in any way at all, and if there was nothing else in the case but that, it is not within the meaning of the Act because it does not interfere with interstate commerce and in nowise affects in- page 50 } terstate commerce.

Mr. Lowden pointed out here that the Act safe-

guards the rights of employees. Here is was, the Laburnum Construction Company, no right of employees or anything about it, but you ran this company out of Kentucky. Everything else was incidental to that. There is nothing in here about collective bargaining. You ran this company out of Kentucky. That's this case. It has been admitted time and again. I went through the digest of the pretrial conferences. It has been admitted in there time and again.

As the Court, of course, will remember, this case is governed by the substantive law of Kentucky and the procedural law of Virginia. As Mr. Lowden says, nobody has questioned the right of Congress to preempt the field of interstate commerce, if they want to preempt it, but as Mr. Lowden said, in a perfectly devastating way here, not only they had the intent to not preempt the field, but it shows that they expressly intended not to preempt it.

I don't think I need say anything more about the late date that puts this thing so far up. As I understand the argument here of the other side, that if, incidentally to any labor dispute, there is a murder, like there was out in Harlan County, Kentucky, the state court has no control of that? Suppose there is a strike, like there was in Danville, and they blow up a non-striker's home—the state court got to sit page 51 } down and let them keep on blowing them up until they get something out of Washington?

One of these cases stated in Mr. Lowden's brief—referred to advisedly as Mr. Lowden's brief; I think it is a perfectly splendid piece of work, and I challenge a search of the authorities and find that they are not fairly and fully covered there. So if you are going to have murder, or rape, or arson, or dynamiting, incidental to any labor dispute, has the court got to sit by and take it until Mr. Herzog can come in and do what he thinks is right under the Act?

It said here in the beginning that these cases follow a pattern of the points that are raised and the way they try to kick the state court out. Every single argument that is made here this morning has been made before in this trial, and every single argument made here this morning was made in the *Luray* case, which I followed through with Mr. Lowden from the time the first pleading was drawn until the petition for writ of *certiorari* was denied in the Supreme Court of the United States. The argument here is what the state court of Page County did there, as approved by the Supreme Court of Virginia and the Supreme Court of the United States, that nevertheless this Court has got no jurisdiction here.

As we said here, of course, it seems to me that page 52 } my friend on the other side has vaguely questioned him from beginning to end. He assumes that there has been an unfair labor practice within the definition of the Act. He assumes the intent of Congress to preempt the field against the verbatim statements of the reports in Congress. This case here, of course, was not based on that. Mr. Lowden, in his brief, used an expression which he did not mention in his argument, which they raised in their other brief, that we claim they are "outlaws" under the Act. And they are, as Mr. Fohl admitted in his testimony. And if they wouldn't sign the anti-Communist affidavit and wouldn't qualify under the Act, they can't get under the Act and raise any question under it at all. Then, as Mr. Allen says, it is strange indeed that they would come here today and seek sanctuary under the Act under which they have no rights whatsoever.

There was no strike. Remember Local Union 7785; you remember about the picket signs; you remember about the claim that they were on strike; and you remember the answer to the interrogatory that there never was any strike sanctioned at all. So the only point I want to make, Your Honor, was just to call your attention to the few highlights on the facts here in addition to what has been said on the law.

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Mr. Allen: If Your Honor please, in a case like this, whether a motion is made to set aside a verdict upon the alleged insufficiency of the evidence, or whether it is made upon the ground of alleged errors made by the court or by counsel in the course of argument, the court has to view the case as a whole, considering that we took four weeks to try this case. Errors that might be sufficient to set aside a verdict in a case that has taken only one day wouldn't be sufficient to set aside a verdict in a case that has taken four weeks, and tried as this one was tried. As I say, the court has to view the case as a whole and all of the proceedings.

In this case, every question that has been raised and argued here was raised and argued during the course of the trial, except the question of the excessiveness of the verdict. Every question that was raised in connection with instructions was

raised during the course of the trial, argued at page 154 } length, authorities cited, and briefs filed on all important points. Your Honor patiently and with consideration heard everything that everybody had to say and then ruled. Now in the light of that picture, and in the light of the time that was taken, what is there in this case to justify the Court in setting aside the verdict?

They say that the damages are speculative. Now that has been recognized as a ground upon which to set aside a verdict ever since we have been trying cases, but whether a verdict is excessive or not depends upon the particular facts in each case; whether the damages are speculative or not depends upon the facts of each particular case. They talked about the contracts that Mr. Bryan didn't get and the speculative nature of the question of whether he could have gotten them, and all that sort of thing. If there has been a violation of a man's fundamental rights, and some damage is established, a different rule is applicable in a case like that and a case where it is speculative as to whether any damages were suffered.

I think a late case in Virginia—and the law in Virginia is not any different from the Kentucky law—a case that deals with speculative damages and contracts which were not obtained, is the case of *Fensom v. Rabb*, 190 Va. 788, 58 S. E. (2d) 18. To show you how speculative the situation was there,

page 155 } Fensom was operating a manufacturer's agent's business. Finsome had been operating that business for a number of years. Every year he made contracts for a year at a time. The contracts were never made for longer than a year, and they were reviewed at the end of each year. Rabb comes up and buys the business from him upon the representation that he was in good standing with the manufacturers whom he represented, but upon the distinct representation that Finsom didn't have the contracts but a year at a time. They were not transferable, but as long as he—as long as the manufacturer is in good standing, the greater probability was that the contracts would be renewed. Now to show you the exact facts in the case—

The Court: As long as the manufacturer was in good standing? or you mean the manufacturer's agent?

Mr. Allen: Manufacturer's agent. The testimony shows that as long as the manufacturer's agent was in good standing the greater probability was that the contracts would be renewed.

Now the entire business, which Rabb paid \$25,000 for, consisted of nothing on earth but the renewal of those contracts. And here is what the court said:

“ * * * The contracts of The John Fensom Company with the manufacturers whom it represented were annual, and for all practical purposes contracts-at-will due to the revocability clauses therein. The plaintiff knew this. There page 156 } was no assurance any one could give that the manufacturers would renew their contracts from one year to the next. The defendant could not make any guarantee of this and the plaintiff knew it. Even if the manufacturers contemplated renewing their contracts with The John Fensom Company under its traditional ownership, that would be no assurance on its face that they would renew the contracts under new ownership and management. No uncertainty existed in the minds of either party concerning this. The contract in this respect was an aleatory one. The only factors, therefore, to guide a purchaser of such a business would be those which bore on the probability of such a renewal, and of those, the most important one would be the present standing of the defendant with the manufacturers. The defendant represented that he was in “good standing” with the manufacturers.’ ”

Now it turned out that he was not in good standing with two of the manufacturers and the plaintiff did not get the renewal of those contracts. The court held that as to one of them there was sufficient evidence to show that this representation that he was in good standing was made, but as to the other manufacturer, there was not sufficient evidence of that. So they reversed the case.

There was a verdict below and affirmed by the trial court, but the court of appeals reversed it as to the insufficiency of the evidence as to one, the one out in Knoxville, Tennessee; but as to the other one, they said there was ample page 157 } evidence to support the verdict. The case came back and it was never tried any more. By holding the plaintiff's right to recover, the case was settled.

So there you have a case in which the man didn't even have any assurance that he could get those contracts, and he paid his money for nothing on earth but the representation that The John Fensom Company was in good standing and the evidence that since he was in good standing with the manufacturers, the great probability was that the contracts would be renewed. Now if that wasn't speculative, I don't know what was speculative. There couldn't be anything more speculative than that. The plaintiff was even assured by the defendant, says, “I haven't got the contracts, I can't transfer them to you, they are only annual, but I'm in good standing with them and the chances are that you would not have any trouble renewing them.”

Another late Virginia case on the speculative damages is the case of *Jefferson Standard Life Insurance Company v. Hedrick*, 181 Va. 824. Hedrick, a broker, through whom—an agent of the Jefferson Standard, a broker, through whom Hedrick was trying to negotiate a loan through the Jefferson Standard, represented to the man who was applying for the loan that he had filed the application with Jefferson Standard for the loan. And it turned out he had not filed
 page 158 } it and the man did not get the loan, so he sued the Jefferson Standard for damages. By the way, the court here, in holding the Jefferson Standard liable for the torts of its agents, laid down a very broad doctrine, just as broad a doctrine as the Kentucky cases lay down, with reference to a principal being liable for the acts of its agents. Then it went on to say:

“Counsel for the defendant, in his argument before this court, contends that the amount of the damages has not been proven with certainty. This is not a new question before this court. We have often held that one should not be allowed to escape all liability simply because the precise amount of the damages for which he is responsible is uncertain. Where the existence of a loss has been established, the quantum may be fixed when the facts and circumstances are such as to permit of an intelligent and probable estimate thereof.”

Citing a line of cases.

“Here the loss to Hedrick was not merely uncertain and speculative. Positive and distinct damages have been established. They were such as fairly, reasonably, and naturally flowed from the wrong in the ordinary course of events. Their approximate amount was based upon the estimates of those who were qualified to pass upon the nature and extent of the damages.”

Then they go on at considerable length there to the effect that one who is clearly liable for some damages
 page 159 } cannot escape because the damages cannot be proved with certainty.

Now I say that the rule about speculative damages, after all, where a person's right has been violated and some damages necessarily flowed and accrued from a violation of that right, and when you come to the question of the amount of damages, speculation necessarily comes into it. As a late

Supreme Court case said, in the case of *Lavender v. Kurn*, 327 U. S. 645, the Supreme Court of the United States, in commenting upon the language of the supreme court of Missouri to the effect that the verdict was the result of mere speculation and conjecture, said this:

"It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

So in every verdict there is bound to be a good deal of speculation and conjecture; and if you lay the foundation by first showing, as we have done here, beyond a peradventure of a doubt, the violation of the plaintiff's rights, then we certainly have established a considerable amount of damage. And

after you pass that point, speculation and conjecture are bound to come into the case, and it comes into every case. And when you have a jury as we had here, properly instructed, as we claim it was, who deliberated some six hours on the case, why then there is no such thing as speculation now to set aside this verdict.

I listened with a great deal of interest to Mr. Mullen about what he had to say with reference to the conduct of counsel throughout the case and the remarks made by counsel, and particularly the arguments of counsel before the jury. I do not believe Mr. Mullen has tried any tort cases for many, many years. If he had, and had heard the arguments that are permitted in tort cases involving fundamental rights, such as are made here, I do not believe he would seriously insist that the arguments which counsel for the plaintiff made to the jury is ground to set aside this verdict.

In every tort case involving such facts as are involved in this case, involving a man's constitutional right to do business, involving a man's freedom of contract and freedom of work, and that sort of thing, those cases afford a basis for, as Judge Browning said in one case, "oratory", and, as he said in another, "the day of oratory has not passed." And a man has a right to resort, to a certain extent, to "oratory" if he has any oratorical powers. He has a right to do it.

Take the case of *Commonwealth v. Beatty*. I don't reckon Your Honor is old enough to remember that.

The Court: Murder case?

Mr. Allen: Yes, sir; tried down in Henrico. It is in the books. The court refused a writ. Mr. Windenberg was assisting the attorney for the Commonwealth and got up there and argued to the jury very forcibly: "You acquit this man Beatty, then go out here to the cemetery and dig up the bones of Paverius and apologize to him in sack cloth and ashes; go to Charlottesville and dig up the bones of McCue and apologize to him for convicting him." That is the type of argument Windenberg made. And able lawyers like Mr. Harry Smith and Mr. Hale Carter got that record up, applied to the court of appeals for the writ of error and they refused it.

I wonder if my good friend Mr. Mullen has read any of those speeches in "Classics of the Bar"? Take this man up here in Washington, some years ago, sergeant-at-arms in Congress, who locked a man up at the orders of a congressional investigating committee; and the United States Supreme Court held that it was a violation of his constitutional rights, they didn't have a right to lock him up. And so he sued the sergeant-at-arms for damages. Read the speech that was made in that case, Mr. Mullen. It tops anything Mr. Robertson said.

page 162 } Take the old case—with all due respect to Mr. Robertson, who made a good speech, but that lawyer out-did him in that case—but take the case of *Tilton v. Beecher* where the preacher was sued by Tilton for criminal conversation, alienation of affections of his wife. Take the speech that the plaintiff's lawyer made in that case and compare it with what Mr. Robertson said. Mr. Robertson was mild in his argument. Now talk about the "one organization" and the "great organization", the record shows that. Their own testimony shows that it is one great organization, the exhibits show it.

Another thing, may it please Your Honor, you don't always have to have evidence before the jury for every argument that a lawyer makes. You can base your argument on what is a matter of common knowledge. The size of this organization is a matter of common knowledge; the wealth of the organization is a matter of common knowledge. The newspapers were full of their being fined hundreds of thousands of dollars, and millions of dollars, just in recent years. All of that is a matter of common knowledge. It wasn't mentioned in that way. The fact that it is a great organization is a matter of common knowledge; that it is a large and powerful organization is a

matter of common knowledge. A man has a right to base an argument on that.

page 163 } Mr. Mullen says the argument that I started out—I didn't withdraw the argument because I thought it was not proper to make,—I would have done it, of course, if Your Honor had ruled and said so—but I withdrew it to avoid any argument with Mr. Mullen in the midst of my argument before the jury and went on to something else. But it was certainly permissible to argue in that case, and the court of appeals of Virginia has said—I think in the case of *Clem v. Holmes*, and I know they have said it in a number of other cases—that what would punish one man would not be felt by another. That is exactly what they have said. And they have held repeatedly that evidence of financial wealth is admissible in cases of this kind.

Now Your Honor ruled against us on that in this case, introducing specific evidence of it, because there were three organizations here. But, as a matter of fact, upon the evidence, they all constitute one organization, they say, in their documentary evidence. We were entitled to have that evidence, but we didn't have it. But we did have the fact, admitted by them in documentary evidence put out by them, which was put before the jury, that they are all one organization, backed up by John L. Lewis, president of the Mine Workers. That's all in the evidence. And we had a right to make an argument for punitive damages based on a showing of that kind. What

Mr. Robertson said in that respect was absolutely page 164 } not out of line.

Going back to the question of the excessiveness of the damages, there is an article that has just come out in the California Law Review, written in the last month, reviewing all of the large verdicts that have been rendered in the United States for years. And the author states that the trend of the verdicts has followed the trend of the rise in the cost of living. The value of the dollar has gone down. This verdict of \$275,000 now, why ten years ago \$150,000 would have been about what this \$275,000 amounts to now. And the author says, and he quotes from case after case, where the courts say that that is a matter of common knowledge and the juries have a right to take that into consideration, and the courts should consider that matter in passing upon the excessiveness of verdicts.

You have here positive proof of a sizeable sum of a definite loss. You have a connection with the third largest coal company in the world. You must remember, Your Honor, that

upon considering a motion to set aside a verdict, you have to discard every particle of testimony of the defense that is in conflict with any of our testimony. Mr. Bryan said that when he took this job out there that they told him (this first job) that he wouldn't make much money out of it, it was a difficult job, the place was difficult to get to, but if he took that and got started out there, and did that well, page 165 } they'd give him work for years and years. That's a matter a jury had a right to consider. He didn't have to enter into any binding contract with them. It was a probability of what he would get. Mr. Bryan said they liked him; he liked them: their relationship was fine. And with the standing and responsibility of the Bryans here, you can imagine if they did their work satisfactorily that they would be in Kentucky no matter how long doing this type of work. As he said, they had construction work going on all of the time.

Now that is the opportunity that this plaintiff had, and this plaintiff was deprived of that opportunity. Mr. Mullen said that they didn't lose the business until after this thing happened, sometime afterwards, that they still got some more work out there and didn't lose out until sometime afterwards. In the *Rabb* case, the plaintiff didn't actually lose the contracts until nearly a year afterwards—but he lost them.

With that setting, with the proof of some substantial damages, the jury had a right to make probable estimates, and had a right, to a certain extent, to deal in speculation and conjecture.

So far as the punitive damages are concerned, I agree with Mr. Moore here, the punitive damages were not large enough.

What is a hundred thousand dollars to the United page 166 } Mine Workers? 650,000 members. That was before the jury. What assessment would it take against each member to pay a hundred thousand dollars? Why, it would be *de minimis*. Take the United Construction Workers—they had nothing like the United Mine Workers, but they had a large number of members. Take District 50, the evidence shows, was both territorially and jurisdictionally coextensive with the Mine Workers with thousands and thousands of members. Why, a few cents each assessed against the United Mine Workers would pay the hundred thousand dollars. I say the verdict could well have been two hundred thousand dollars for punitive damages.

What yardstick would the Court have to measure the punitive damages by? Going back to the argument of Mr. Robert-

son to the jury, Mr. Robertson couldn't say, with all of his flow of language and his oratory, he couldn't paint a picture as strong as the picture itself, the picture that was put up right on that post there, the picture which showed the spider-web, the reaching out all over the United States and up into Canada. Mr. Robertson couldn't paint the thing as bad as it was from the evidence. I say his argument didn't go outside of the bounds of the evidence at all.

Mr. Mullen made some argument to the effect that Mr.

Bryan's notes showed a situation different from page 167 } the testimony. Well, Mr. Bryan's testimony is what was before the jury, and the notes were before the jury too. Our court of appeals has said, and the United States Supreme Court has said, that even as to the plaintiff's own testimony they can select that which conforms to their views and supports their conclusions. They held that in the case of *Blue & Grey Atlantic Greyhound Lines*, and so did the United States Court of Appeals for this circuit. I believe you were in that case, weren't you?

Mr. Robertson: That is one I won.

Mr. Allen: You won one and I won one.

Mr. Robertson: You got over on the other side.

Mr. Allen: But in that case the bus driver testified two different ways. In his testimony, Mr. Robertson tried to get him to say all sorts of things. And he testified to one effect that would convict him of negligence and then he testified in another instance—

Mr. Robertson: After you got him.

Mr. Allen: —to the effect that he wouldn't be convicted of negligence. Well, the jury found a verdict acquitting the bus driver and putting the verdict all on somebody else. And the trial judge set the verdict in favor of the bus driver aside and entered judgment against the bus company along with the other defendants. It went up to the court of appeals and they reversed the trial court and said that the page 168 } jury had a right to accept any part, or all, of the bus driver's testimony. They could believe all of it, or that part that was against him they could discard.

So apply that to Mr. Bryan. If Mr. Bryan did testify, as Mr. Mullen says, different from his notes, and I do not question Mr. Mullen's accuracy on that, his sworn testimony was given on the witness stand; and if his sworn testimony supports the verdict, the jury had a right to accept it. And that's what they did.

I am not going to say anything much about this charge that Mr. Bryan and Mr. Robertson both made, about the United

Mine Workers and United Construction Workers being outlaw organizations. As a matter of fact, if Your Honor will go back and read that transcript carefully, you will see when Mr. Bryan came out with that statement he was sort of in a state of desperation. Mr. Mullen, on cross examination, was just driving—"Why wouldn't you negotiate with these people? You, over yonder at Hopewell, you wouldn't negotiate with them there, and you wouldn't negotiate with them in Kentucky—why wouldn't you negotiate with them?" Now he wasn't using that exact language, but the whole tenor of it was trying to pin Mr. Bryan down and make him admit that he refused to negotiate.

Mr. Bryan then says, "They are an outlaw organization. I wouldn't negotiate with them. I would just as soon negotiate with robbers." And I say Mr. Mullen pressed him into that. Whether Mr. Mullen pressed him into it or not, it is a matter of common knowledge and evidence in this case that so far as the law we have been arguing about and talking about here, they are an outlaw organization. They are outside of the law of the Taft-Hartley Act. The National Labor Relations Board has no right to hear any complaints that they might have to make. And as a result of that, and the jury had a right to consider that, they took the law in their own hands and tried to handle the situation.

I say that was not a remark for which Your Honor can set aside the verdict, and that Mr. Robertson's argument in that respect was not improper.

All of this talk about the "biggest lawsuit", Mr. Robertson saying the biggest lawsuit he ever had, I don't suppose it was necessary for Mr. Robertson to say that. Certainly it is the biggest one I ever had; and I daresay it was the biggest one Mr. Robertson ever had; and I reckon everybody on the jury knew it was the biggest one ever tried around here. It was the biggest one any lawyer in Richmond ever had, so far as that is concerned. It is a foregone conclusion. That certainly is not anything for which to set the verdict aside.

page 170 } All of these cases, dealing with remarks of counsel and remarks of witnesses and things coming out in the testimony, and this, that and the other happening, are all thrown in, so to speak, and the court is called upon, in the last analysis, to say have these defendants had a fair and impartial trial, according to law? And when it has been shown to the court that they have had a fair trial, according to law, that is the end of the case. The statute itself says so.

Now I ask Your Honor, after four weeks of trying this case, hearing every question argued as we went along, hearing all of the instructions discussed at length—and, by the way, take that set of instructions and read them at one setting, right from the beginning to the end, and I don't think anyone can say that a better, fairer set of instructions were ever given to any jury. When you consider the instructions and consider the time and the deliberation which was given every question that was raised, how much better, if any, could any court try this case than it was tried, in the absence of some light from on high? If you set this verdict aside and grant a new trial, could we try the case any better? Could Your Honor try the case any better? Could any trial judge try the case any better, in the absence of an opinion from the court of appeals? We have all done the best we could.

page 171 } As the court of appeals has said in cases like this, counsel sometimes will—I don't say Mr. Robertson stepped out of bounds here, I don't think he did, in view of all of the circumstances, but if he did, the court of appeals has said that it is sometimes natural for men in their zeal for their client's interest to step a little out of bounds and make arguments that are improper. It is to be expected. But unless it be shown that it really affected the jury and prejudiced the defendants, why then there is no error and the court should not set the verdict aside on that account.

I think, sir, that these defendants here have had as fair a trial as they could get any where. Naturally, in view of matters of common knowledge concerning the United Mine Workers, there is going to be probably some prejudice against them. But that was as fair a jury as was ever impaneled. They were good businessmen. It was an old common law jury of twelve men; each side had a right to strike off three men. It is the fairest way to get a jury—a good jury. They were all high men, men selected as a special jury to try this case with the privilege of either side getting rid of three and you wind up with twelve, and without exception. Nobody excepted to any juror, and nobody today has excepted to any juror. And there is no evidence of any passion, page 172 } bias, or corruption, and they were the three words used to justify the setting aside of the verdict.

Mr. Robertson: If Your Honor please, I would have preferred not to have argued this case at all. I do not think that there is anything that has been said here on either side today that is not set out in the memorandums that have been filed with the Court. You remember the memorandums that we

have filed throughout this trial, you remember the trial memorandums, and you remember the various other memoranda we filed in the pretrial conferences and throughout the trial. They are all now summed up into these last two memorandums that we have put here. They represent all that we have to say, in the best way we know how to say it.

As long as I have got to argue the case, there are some number of things that I am going to refer to very briefly. But, first of all, I am going right to the heart of the thing that concerns me personally, and that is whether or not there was any impropriety in any remarks that I made throughout the course of this trial or any argument that I made throughout the course of this trial. I say to this Court and to everyone in this courtroom now that my conscience is clear, that I think I was within my rights and the rights of my client, that I have

no apologies to offer, and that everything I did
page 173 } was justified and I had a right to do it. My friend,

who told the jury that he moves in these higher realms, that he hadn't tried a case for years, that "I'm a business man and lawyer," has forgotten that a jury trial is a fight and not a pink tea party. And as long as I am fighting for my client, I am going to take advantage of every legal right my client's got, to the best of my ability, and I am not going beyond what I've got a right to do, if I can help it.

Now I am not going to belabor this point, but I am going to say two other things. That motion that was made on March 29 for a mistrial on the alleged ground of improper comments and arguments by me, why Mr. Mullen came in later on, on February 16, and said that the real purpose of that thing was to shut me up and that it was not intended to get a mistrial. I say then that there has been some plain talk here today and there have been some harsh things said of me, but if that was what he was driving at, it was a fraud on the court. He made out like he was asking for a mistrial on account of my misconduct, when, according to his own senior counsel in this case, his statement was for an entirely different purpose. Is that coming clean with the Court? and can senior counsel in a case be pulled out of his admission by a junior counsel in the case, as they attempt to tell Your Honor here today?

page 174 } I want to say one other thing while I am on this. I am going to assume Your Honor's memory is as bad as mine. It is perfectly amazing how you can forget these things. And I say if you can go back to that motion on the 29th of March, as I believe is set forth again verbatim in their brief here, and I hope the Court will go back to

the record and read the context and the settling within which the different remarks were made—I don't know who prepared that motion and I don't care—I say that the way the remarks were lifted out of that context, the way they were distorted, the way they were misinterpreted, constitutes as unfair an attack upon counsel in the case as I have ever known since I have practiced law; and I say it was a scurrilous attack on me.

I have only one other thing to say on that. I do not want there to be any mistake here as to where I am standing on it. I am not apologizing for what I say. I say what I said was justified within the law and I had a right to say it and it was my duty to say it. But I want to say this other thing. I don't care what exceptions have been made here and there under the particular facts of a certain case; I say that the law of Virginia is this. There is one incorrect statement in these briefs that we filed. I wrote that part of it. I said they failed to object when the argument was made. In many instances they did. Mr. Mullen cited time after time page 175 } and thing after thing here today that he never took any objection to at all. In the others, what did he say? He said, "You are going far afield there." And the Court would tell me to stop. Well, I think that was an objection to it and I was wrong when I said they made no objection in the instances where they did make objection. But he took no exception. And when the Court told the jury to disregard it, that satisfied him and he sat silent. And I tell Your Honor that the law of Virginia is this—that if Your Honor is against me in the trial of a case and you make an argument to the jury that I think you've got no right to make, and I really mean business, and I make an objection to it, and the court says, "Gentlemen, disregard that statement," if I'm not satisfied with that, I've got to risk coming out and showing my colors and antagonizing the jury and saying, "Well, that is all right, Your Honor. The damage has been done. Now I ask for a mistrial." And if the Court refuses a mistrial, I except and save the point. And if I haven't got the guts to do that and run the risk of turning the jury against me, but have nevertheless got enough confidence in my part to say, "Well, you may stick me here, but I am going to save it for the court of appeals,"—and they didn't have the *hearti*-hood and they didn't have the courage to come along here and risk turning the jury against them; but then page 176 } weeks after the case is over, they come up here and say, "We want a mistrial." That's all I've got to say about the alleged comments of mine.

Now, if Your Honor please, I know that the Court will read these briefs that have been filed here preparatory to this argument on both sides. I think we have done, in our brief here, a piece of work that will be as helpful to the Court—I believe it will be more helpful to the Court than any brief I have personally had any part in making up.

The reason I am taking the time for this. Your Honor, I want to sort of prepare Your Honor to get the benefit of the brief. There are 2,500 pages, about, of transcript for the actual four weeks of the trial. There are approximately another 500 pages of transcript of pretrial conferences. When they say, for instance, that there is no evidence here to support the verdict, if we try to go through that mass of transcript and put it out into the brief, it would be so long that it would just be an imposition upon the Court, and it would be so boring no human being could keep his mind on it. The reason I say that, I happen to know that it took ten days of good, honest, hard work to prepare this digest of the trial transcript from 2,500 pages; and there is some of the dreariest reading in it as you ever read in your life. But if you turn

back there to Appendix B, that whole thing is
page 177 } digested down to 73 pages, and Your Honor can
turn there to that trial transcript digest, and if
you read it through from beginning to end, it will call back to your mind the high points and the essential points of this case fairly digested, the things that are against us as well as the things that are in our favor. And then there is a reference to the transcript where you can turn immediately to it without searching for it, if you want to.

Likewise, we have made a digest of the pretrial conferences, and it will show many things there. I will tell you the reason we did it. All through those pretrial conferences, counsel for these defendants made what we considered then, and we consider now, many damaging statements against themselves. And when I read it last night, I was pleased when it called back to my memory that in the pretrial conferences, as Mr. Mullen himself admitted, it is all one organization composed of constituent parts,—and, of course, it wouldn't have made any difference whether he admitted it or not anyway, because the constitution of the United States Mine Workers says so in Article 2, and they keep on saying so in all of the interrogatories and answers that we have cited in our brief.

I will come on to these notes that I jotted down here while
other people were arguing the phases of the case
page 178 } not based on the motion to dismiss, and I have
very little to say.

While Mr. Allen was talking about that article which appeared within the past month from, I believe he said, the University of California, it came back to my memory—I can't remember the case, but I'll bet somebody else in the courtroom can remember it—that during the flush times that attended World War I, down in the Newport News area, there was a personal injury action that came up from there and went to the court of appeals; and I think there was a verdict of some 30-odd or 40-odd thousand dollars, which apparently at that time was the biggest personal injury award ever made in Virginia. And the court of appeals, in its opinion, said the court will take judicial knowledge of the decreased purchasing value of a dollar. That's right along the line of what Mr. Mullen was saying there. I have nothing more to say about that.

As to this breach of this business relationship, that was put squarely before—squarely before—the jury as an issue of fact; as to the date when it occurred was before the jury as an issue of fact. Well, suppose they do keep on bidding, suppose they do keep on trying to get business, suppose they do keep on in correspondence and in conferences and in interviews, and you still don't get any business, haven't they destroyed your business relationship so far as any page 179 } good is concerned? haven't they lost the customer?

Talk about uncertainty of contracts, these contracts were cost-plus-5%, and what constituted cost was defined in the contract. So you have the definition of "cost" and on top of that you have your 5%. Is there anything speculative about that? They said in there that home office expenses should not be allocated to the job, but what confined meant was job costs. It was job costs plus 5%.

The destruction of a business connection—I stated about the date of that. Why do these things keep running back in your mind? When they sat silent there about my argument, why does it come into your mind "He who has remained silent when he ought to have spoken will not be heard to speak when he ought to remain silent?" And when you talk here about loss of business connections and damage to business reputation, why does the old definition of good will keep coming back into your mind?—nothing in the world but the expectation that the old customer will come back and do business at the old stand. And they stopped it here. Damage to business reputation? How can you tell how much they have damaged my reputation by what they have said here today? If you attack a woman's chastity, how much can you

tell about that as to how much value there is to their reputation? Afraid to go on the record, afraid to ask page 180 } for a mistrial, but I voted for Dewey and I feel like the woman "nothing now makes any difference"; and they ran us out of Kentucky, they ran us out of West Virginia, they made it impossible for us to do business with these big people. Now what other big people are going to handle us? What other big people will want us when they are afraid they will get involved with the United Mine Workers—this "one organization."

If I understand Salvati's testimony, and I read it here very recently, it is this, which I believe is a fair interpretation—that we had this empire composed of the Island Creek Coal Company, and the subsidiary and associated and affiliated companies, and we covered such a broad field that had so many difference phases of operations that we were always doing work of the kind that Laburnum is equipped to do; and that we would be engaged in that business indefinitely; and because of the confidence that had in Laburnum, and the type of work they had done and their standing with us, we were going to give them that work on a cost-plus basis indefinitely. And it was profitable work and a valuable business connection. I think that anybody fairly reading Salvati's testimony will bear me out on that.

I do not think this will stand up. Mr. Mullen says the construction business is a hazardous business, an page 181 } uncertain business, therefore you can never be sure of your profits. That may be the experience that has caused them to go into cost-plus-5%. And if your costs are defined and your plus is defined, you are not very apt to go broke.

Mr. Mullen referred here to something that he says for the first time today, so far as I recall, that was unfair in my opening statement. Why didn't he get up and object to it? Why didn't he say something to Your Honor about it? Why didn't he say something to the jury about it? Why didn't he object and ask for a mistrial? Why didn't he take an exception? Why did he wait until today?

I say just exactly what Mr. Allen said, that all of these defendants are outlaw organizations under the Taft-Hartley Act, and that is just the garden variety of the vernacular of the day that everybody in this room has heard them so described in the press, in conversation, and everywhere else, and there is no misunderstanding about it and nothing unfair in saying it. Fohl was the man who said, "We didn't have to go to the Taft-Hartley Act, we could get just as good

results in other ways, we could do better outside of the law than inside the law"—that particular law.

I haven't enjoyed it here today. I have been knocked around enough in jury trials too, generally representing the defendant, and I have been kicked around right page 182 $\frac{1}{2}$ smart, and have had to sit and take it when it was dished out to me, and it was at least some satisfaction to me to find out that I had learned, in some measure, to dish it out. And if it got under Mr. Mullen's hide to the extent that it seems to have done, I think I have made a far better argument than I had any idea I made, because he's not any spring chicken either.

The jury was out six hours. You remember they came in after twelve o'clock at night. They weren't swept on by any great Churchill eloquence from me. Your Honor knows that jury. Do you think anything I said really influenced that jury? Do you think that anything any lawyer in this case said really influenced that jury? Or do you think what influenced that jury was the testimony that came from the witnesses?

About the income tax question. It might have been said in the brief, I don't remember, but the first time it has ever been said verbally what they wanted with those income tax returns has been said here today. They didn't tell the Court when the Court ruled on it what they wanted to prove with it, or what they hoped to prove with it. But I don't think that makes any difference because I remember this, Your Honor, and I think this will call it back to your memory. When the question was whether they were going to answer the jury's question or not, we came in, and I remember it so vividly because it was Mr. Lowden who made the suggestion to me, he said, "Let's tell them either way they want is all right with us, and we can't be in error then. Whatever they want to do is all right with us." So we came in and told them that. And my recollection is they went in a huddle by themselves outside of chambers and came back and said they didn't want it to go to the jury. And everybody agreed that it was a thing which should not go to the jury.

The size of this organization—and that is in answer to one of the interrogatories and it is shown in our digest there. The sizes of these organizations are in the evidence. The United Mine Workers—650,000; my recollection is United Construction Workers—112,000—or maybe District 50—112,000, and maybe the other one—42,000.

If Your Honor please, we submit that there is no error in

this record, that this is a fair verdict, fairly arrived at, and we ask the Court to enter judgment on the verdict.

* * * * *

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* * * * *

The Court: Gentlemen, I want to thank all of you. I will let you hear from me as soon as I can. Court is adjourned.

(Whereupon, at 5:55 p. m., the proceedings adjourned.)

* * * * *

A Copy—Teste:

M. B. WATTS, C. C.

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday, the 23rd day of January, 1952.

UNITED CONSTRUCTION WORKERS and others, Plaintiffs in error,

against

LABURNUM CONSTRUCTION CORPORATION, Defendant in error

From the Circuit Court of the City of Richmond

Upon the petition of United Construction Workers, affiliated with the United Mine Workers of America; District 50, United Mine Workers of America; and United Mine Workers of America, a writ of error and supersedeas is awarded them to a judgment rendered by the Circuit Court of the City of Richmond on the 5th day of July, 1951, in a certain notice of motion for judgment then therein depending wherein Laburnum Construction Corporation was plaintiff and the said petitioners were defendants; and it appearing from the certificate of the clerk of the said circuit court that supersedeas bond in the penalty of \$325,000, conditioned according to law, has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

A Copy, Teste:

— —, Clerk.

Vol. 2215]

VIRGINIA

In the Circuit Court of the City of Richmond the — day of —, 19—.

Harold F. Snead, Judge; Wilbur J. Griggs, Clerk

I, E. M. Edwards, Deputy Clerk of the Circuit Court of the City of Richmond, do hereby certify that the defendants in the suit of Laburnum Construction Corporation vs. United Construction Workers, Affiliated with United Mine Workers of America, District 50, United Mine Workers of

1944

America and United Mine Workers of America, have executed a suspending and supersedeas bond in the penalty of Three Hundred Twenty-five Thousand Dollars (\$325,000.00) in accordance with the statutes in such cases made and provided.

(S.) E. M. Edwards, Deputy Clerk, Circuit Court of the City of Richmond.

Rec'd. January 23, 1952. M.B.W.

[fol. 2216]

VIRGINIA

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday, the 2nd day of February, 1953.

UNITED CONSTRUCTION WORKERS and others, Plaintiffs in error,
against .

LABURNUM CONSTRUCTION CORPORATION, Defendant in error

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Richmond on the 5th day of July, 1951

This case was this day fully heard upon a transcript of the record of the judgment aforesaid and arguments of counsel, but because the court is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

A Copy, Teste :

— — —, Clerk.

1945

[fol. 2217] OPINION BY JUSTICE JOHN W. EGGLESTON—Richmond, Virginia, April 20, 1953

Present: All the Justices.

Record No. 3989

UNITED CONSTRUCTION WORKERS, Affiliated with UNITED MINE WORKERS OF AMERICA, District 50 United Mine Workers of America, and United Mine Workers of America

v.

LABURNUM CONSTRUCTION CORPORATION

From the Circuit Court of the City of Richmond, Harold F. Snead, Judge -

This is a tort action instituted in December, 1949 by Laburnum Construction Corporation, sometimes hereinafter referred to as the plaintiff, or Laburnum, against United Construction Workers, Affiliated with United Mine Workers of America, District 50 United Mine Workers of America, and United Mine Workers of America, sometimes hereinafter called the defendants, for recovery of compensatory and punitive damages in the aggregate sum of \$500,000.00.

The notice of motion for judgment charges that in July, 1949, while the plaintiff was engaged in certain construction work in Breathitt county, Kentucky, pursuant to contracts with Pond Creek Pocahontas Company and Spring Fork Development Company, the defendants' agents came to the site of the work and demanded that the plaintiff's employees become members of the United Construction Workers, that plaintiff recognize that organization "as the sole bargaining agent" for its employees on such projects, and threatened that if the plaintiff and its employees refused to comply with these demands it would not be allowed to continue with its work on these projects; that upon the refusal of the plaintiff and its employees to yield to these demands and threats the defendants' agents by "a series of violent, malicious and unlawful acts," so threatened and intimidated the officers and employees of the plaintiff that it was unable to continue with the construction projects and

was compelled to abandon them. It was further alleged that as the direct and proximate result of such acts of the defendants' agents the plaintiff was greatly damaged and injured "in and about its property and reputation," its profitable business connections were lost and destroyed, and it was deprived of large profits which it would otherwise have earned.

Each of the defendants filed a plea of not guilty and grounds of defense, denying all of the material allegations of the notice of motion for judgment.

After a protracted trial the jury, by their verdict, found all of the defendants "jointly and severally liable" and [fol. 2219] awarded the plaintiff "compensatory" damages of \$175,437.19, and "punitive" damages of \$100,000, making a total of \$275,437.19. The defendants filed a motion to set aside the jury's verdict as contrary to the law and evidence and grant a new trial, assigning numerous errors during the proceedings. While this motion was pending the defendants filed a motion to dismiss the plaintiff's notice of motion for judgment and enter a final judgment for the defendants, on the ground that the court was "without power, authority and jurisdiction to hear and determine the issues in this action because such determination would be repugnant to and in violation of the Labor Management Relations Act, 1947 (61 Stat. 136, ch. 120, Section 1, *et seq.*, Public Law 101), and to Article 1, Section 8, of the Constitution of the United States." These motions of the defendants were overruled and judgment was entered on the verdict. We granted writ of error.

Jurisdiction

We shall first deal with the assignment of error which challenges the authority and jurisdiction of the lower court to hear and determine the issues in this action. The contention is that the conduct of the defendants' agents upon which the plaintiff's action is grounded—that is, coercing [fol. 2220] plaintiff's employees to become members of one of the defendant unions—constitutes an "unfair labor practice" in violation of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U.S.C.A., Sec. 151, *et seq.*), as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C.A., Sec. 141, *et seq.*); that that Act "estab-

lished a single paramount administrative authority for the redress and prevention" of such practice; And that although the Act does not "provide for damages to the employer" because of such practice, yet the State courts are deprived of jurisdiction to entertain "any action for damages based upon such conduct."

The defendants argue that the record shows that Laburnum is a Virginia corporation, with its home office in Richmond, Virginia; that it engages in industrial construction work in several States; and that at the time of the acts complained of it was engaged in construction work for two large coal producers with mines in Kentucky and West Virginia, whose output was being shipped in interstate commerce. Hence, it is said, the labor dispute in which the plaintiff become involved and out of which its cause of action arose, so affected interstate commerce as to be within the purview of the Act.

[fol. 2221] Section 1 of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*), as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A., Sec. 141, *et seq.*), hereinafter referred to as the "Act" recites that its "purpose and policy" are "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce." (61 Stat. 136, 29 U. S. C. A., Sec. 141.)

Under Section 7 of the Act, "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities * * *." (29 U. S. C. A., Sec. 157.)

[fol. 2222] Section 8 of the Act provides that certain conduct on the part of an employer or a labor organization shall constitute "an unfair labor practice." Under its terms, "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7: * * * ." (29 U. S. C. A., Sec. 158.)

Section 10 of the Act provides these remedies through proceedings before the National Labor Relations Board and in federal district and appellate courts: The Board is empowered to prevent unfair labor practices affecting commerce (Sec. 10(a); 29 U. S. C. A., Sec. 160(a)), and to that end may "issue and cause to be served upon" a person charged with any such practice "a complaint stating the charges in that respect" (Sec. 10(b); 29 U. S. C. A., Sec. 160(b)), conduct a hearing upon the charges and, upon a finding that they have been sustained, issue an order requiring such person to cease and desist from such unfair labor practice (Sec. 10(c); 29 U. S. C. A., Sec. 160(c)). A right of appeal from a final order of the Board is afforded to an appropriate United States circuit court of appeals (Sec. 10(f); 29 U. S. C. A., Sec. 160 (f)). Pending a hearing of the matter before it the Board may petition an appropriate United States district court for, and such court may grant, an "appropriate temporary relief or restraining order." (Sec. 10(j); 29 U. S. C. A., Sec. 160(j).)

[fol. 2223] We may assume, without deciding, that the acts of the defendants so affected interstate commerce as to come within the purview of the Act and, at the instance of the plaintiff, could have been dealt with in the manner there prescribed. But it does not follow that that was the only redress open to the plaintiff. It did not seek relief because the acts of the defendants' agents were unfair labor practices, nor is its present case predicated upon the Act. It sought damages for a completed common-law tort for which admittedly the Act affords no redress.

It is settled by recent decisions of the Supreme Court of the United States that by the passage of the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. A., Sec. 151, *et seq.*), as amended by the Labor Management

Relations Act of 1947 (61 Stat. 136, 29 U. S. C. A., Sec. 141, *et seq.*), Congress has occupied and closed to the States the field of "regulation of peaceful strikes for higher wages" in industries engaged in interstate commerce. *International Union, etc. v. O'Brien*, 339 U. S. 454, 457, 70 S. Ct. 781, 783, 94 L. Ed. 978; *Amalgamated Ass'n., etc. v. Wisconsin Employment Rel. Bd.*, 340 U. S. 383, 390, 71 S. Ct. 359, 363, 95 L. Ed. 364.

But this is not to say that by the passage of the Act the courts of the several States have been deprived of their [fol. 2224] traditional power and jurisdiction to deal with unlawful conduct committed within their respective territorial limits during the course of a labor dispute which may affect interstate commerce. The Supreme Court has repeatedly held that an "intention of Congress to exclude states from exerting their police power must be clearly manifested." *Allen-Bradley Local, etc. v. Wisconsin Employment Rel. Bd.*, 315 U. S. 740, 749, 62 S. Ct. 820, 825, 86 L. Ed. 1154, and cases there cited. As was said in *Kelly v. State of Washington*, 302 U. S. 1, 10, 58 S. Ct. 87, 92, 82 L. Ed. 3, " * * * the exercise by the state of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' "

In *Erwin Mills, Inc., v. Textile Workers Union of America*, 234 N. C. 321, 67 S. E. 2d 372, it was held that the federal Act did not deprive the State court of the power by appropriate action to protect persons and property from threatened unlawful acts of violence committed during the course of a strike or labor dispute and injurious to the rights of the State's citizens. To the same effect are, *Williams v. Cedartown Textiles*, 208 Ga. 659, 68 S. E. 2d 705; *International Moulders, etc. v. Texas Foundries*, [fol. 2225] Tex. Civ. App., 241 S. W. 2d. 213; *State v. Thatch*, 361 Mo. 190, 234 S. W. 2d 1; *Rice & Holman v. United Elec. Radio & Mach. Wkrs.* 3 N. J. Super. 258, 65 A. 2d 638.

The determination of the present question is governed by the same principles. While the Act provides a remedy to restrain the commission of acts constituting unfair labor practices, there are no words which indicate that such

remedy is exclusive, or that the Act was designed to deprive an employer or his employees of the common-law rights of action in a State court for acts of violence or intimidation which may constitute unfair labor practices. Nor does the exercise by the State of its jurisdiction in enforcing such cause of action conflict with any of the provisions of the Act, or in any way impinge upon the rights thereby protected.

Upon substantially this reasoning the Supreme Court of Alabama in *Russell v. International Union, etc.*,—Ala. —, 64. So. 2d 384 (decided March 13, 1953) upheld the right of the State court to entertain an action for damages against a labor union for malicious acts of violence and threats of personal injury by the union's agents which prevented "plaintiff from engaging in his employment," although such conduct on the part of the union's agents constituted an unfair labor practice under the federal Act.

The motion to dismiss was properly overruled. [fol. 2226] The remaining assignments of error raise these basic questions:

(1) Is the finding that Laburnum was entitled to an award of damages against the defendants supported by the law and the evidence?

(2) Is the quantum of the compensatory and punitive damages supported by the law and the evidence?

(3) Did the lower court correctly rule on other matters arising during the course of the trial?

Liability of the Defendants

Laburnum Construction Corporation was organized under the laws of Virginia in 1937 and has its principal office in Richmond. Since 1942 its president has been A. Hamilton Bryan. It specializes in industrial construction and during the ten years preceding the events with which we are concerned it had successfully performed contracts amounting to an average of about \$2,000,000 per year.

On April 15, 1947, the plaintiff entered into a contract with Richmond Building & Construction Trades Council, an affiliate of the American Federation of Labor, whereby it agreed to employ, if obtainable, only members of that

union when working in an area over which an affiliate of [fol. 2227] that union had jurisdiction.¹

During the period from September 6, 1947 to December 1, 1949, the plaintiff performed work in West Virginia and Kentucky for Pond Creek Pocahontas Company, Island Creek Coal Company, and their subsidiary companies, under twelve separate contracts amounting to more than \$650,000, from which it derived an annual profit slightly over \$25,000. These two coal companies and their subsidiaries, including the Spring Fork Development Company, comprise the third largest commercial coal producing unit in the United States and the largest in the West Virginia and Kentucky coal fields. They usually have considerable construction work in progress on their properties.

The relationship between the plaintiff and these companies was based upon personal friendship as well as upon a record of business integrity and performance. Bryan, the president of Laburnum, was a friend of J. D. Francis and Raymond E. Salvati, president and vice-president in charge of operations, respectively, of both companies. Since June, 1949 Salvati has been president of both companies under a common management.

In October, 1948 the two coal-producing companies determined to open a mine in Breathitt county, Kentucky, and [fol. 2228] Bryan was asked to undertake the building of the preparation plant there. Because of the undeveloped condition of the roads and lack of living accommodations for the laborers, Bryan was told that if Laburnum would undertake the project it would be awarded additional work which would be required for the operation of another mine in Breathitt county, amounting to more than \$600,000, on the basis of cost plus a fee of five per cent.

On October 28, 1948, the Pond Creek Pocahontas Company awarded the plaintiff a contract for construction of the preparation plant on the basis of cost plus a fee of five per cent, the total fee not to exceed the sum of \$12,000. The estimated cost of the project was \$200,000. Work on this project was commenced November 1, 1948, and was approxi-

¹ This agreement was executed prior to the effective date of the "Right to Work Statute." Acts 1947, Ex. Sess. ch. 2, p. 12; Code of 1950, Sec. 40-68 ff.

mately ninety-five per cent completed when it was interrupted on July 26, 1949. Pursuant to their agreement the coal companies also awarded Laburnum several projects included in the additional work to which reference has been made.

Upon commencing the work in Breathitt county, Laburnum, in compliance with its agreement with Richmond Building & Construction Trades Council, procured skilled laborers through the nearest local affiliates of the American [fol. 2229] Federation of Labor. With the knowledge and consent of these affiliates it employed local unskilled laborers who were not members of any labor organization.

Laburnum proceeded with its work on these several projects without trouble until July 14, 1949, when William O. Hart, speaking from Pikeville, Kentucky, telephoned Bryan who was in Richmond. According to the testimony of Bryan, which was accepted by the jury, Hart identified himself as a "field representative of the United Construction Workers and District 50 of the United Mine Workers of America," working under David Hunter, "Regional Director of Region 58 of United Construction workers and District 50," with headquarters in Pikeville. Hart told Bryan that he was familiar with the work which Laburnum was doing and about to do in Breathitt county, that the plaintiff was "working in United Mine Workers territory," and that he (Hart) would close down this work unless the plaintiff recognized the United Construction Workers in the employment of its workers. Bryan told Hart of Laburnum's agreement with the American Federation of Labor affiliate at Richmond, under which it was to employ members of that union, and that consequently it would not be able to comply with Hart's demand and make an agreement with the United Construction Workers. Hart replied that he was going "to take over" the plaintiff's work, that he intended [fol. 2230] to "organize" all of its workers, "including the carpenters, electricians, pipefitters, ironworkers, millwrights, laborers, and everybody else," and that if the plaintiff failed to make an agreement "recognizing the United Construction Workers, he (Hart) would close down" all of the plaintiff's work in Breathitt county, as had been done in other instances within his (Hart's) territory.

According to Bryan, during this conversation Hart said

nothing as to any of Laburnum's laborers being dissatisfied with their wages or working conditions, but based his statements on the fact that Laburnum was working in United Mine Worker's territory and must recognize the United Construction Workers, the latter's affiliate. Just before concluding this telephone conversation Bryan requested Hart to communicate with him before he took any other steps, and Hart agreed to do so.

Bryan immediately telephoned Cecil M. Delinger, his superintendent at the Kentucky job site, about his conversation with Hart. Delinger told Bryan that he knew nothing of any labor trouble, or any threatened complaints.

On Monday, July 25, about 7:30 p. m., Delinger telephoned Bryan that he had been informed that on the next [fol. 2231] day, at noon, the United Construction Workers were coming to the job site with a large group of men, that they would be armed, and would stop the plaintiff's employees from working on the projects.

It was then too late for Bryan to catch a train for arrival at the job site by noon the next day, so with one of his employees he set out for Kentucky that night in a company truck, reaching Huntington, West Virginia, about 7:00 a. m. on Tuesday July 26. Bryan then undertook to call Hart at Pikeville, Kentucky, and was informed that he was not there but that he might speak to Hart's "boss", David Hunter, regional director of District 50 United Mine Workers of America, and regional director of United Construction Workers. Bryan requested Hunter to direct Hart not to interfere with the plaintiff's workmen before Bryan had an opportunity to talk with Hart at the job site. Hunter stated that he would try to get the message to Hart.

Having been delayed by trouble with his truck Bryan did not reach the job site until about 3:00 p. m. on the same day. When he arrived there he found that all work on the several projects in which his men were engaged had stopped. It developed that about noon on that day Hart had arrived [fol. 2232] at from 40 to 150 men. There is evidence that this was "a very rough, boisterous crowd," that some of the men used abusive language, that some were drunk, and that some carried guns and knives.

There is evidence on behalf of the plaintiff that when

Hart and his men reached the "schoolhouse site" upon which some of the plaintiff's skilled laborers were working. Hart demanded that these workmen join the United Construction Workers. When several of the Laburnum workers informed Hart that they were members of the American Federation of Labor, Hart replied, "God damn you, if you work here you are going to join the United Construction," or else we will kick you out of here."

Hart and his men then went to the coal preparation plant and told the Laburnum workers there that he was taking over the job and that the Laburnum workers would have to "join up with the United Construction Workers." He accosted other employees of the plaintiff at another site where he repeated his threats that he would "take over" the job unless they joined the union which he represented. Some of the plaintiff's employees yielded to these threats and agreed to join Hart's labor organization, while others refused to do so.

[fol. 2233] It is true that Hart's version of these incidents is quite different. He denied that he undertook to coerce the plaintiff's employees into joining his union, or that he told them that they could not work unless they did so. In short, his story is that he went to the job site for the purpose of organizing the unskilled laborers who were unorganized and not members of any union, and to "represent" other employees of the plaintiff who were dissatisfied with their wages and working conditions. He related that some of the plaintiff's employees, including both the skilled and unskilled laborers, voluntarily signed up with the United Construction Workers.

The verdict of the jury has, of course, resolved this conflict in favor of the plaintiff.

When Bryan arrived at the job site and was informed of what had happened, he talked to Hart and reminded him of their telephone conversation of July 14, when Hart had promised to let Bryan hear from him before he undertook to stop the work. Hart denied that he had any such understanding and repeated to Bryan that the latter was in United Mine Workers' territory, that he (Hart) was "taking over" for the United Construction Workers regardless of the fact that the majority of the Laburnum employees were mem-

[fol. 2234] bers of the American Federation of Labor, or had made application to join it.

According to Bryan, Hart further admitted that he had received Bryan's message sent through David Hunter that morning, but asserted that he "had already made all his plans and arrangements and couldn't stop them." He boasted to Bryan, "I bet you \$500 right now that you will never finish your job unless you use United Construction Workers' men," adding, "Nobody has ever been able to buck the United Mine Workers yet, and you can't do it either."

There is ample evidence to support the finding that because of the insolent and abusive language and threats of Hart and those accompanying him, the Laburnum employees, who were greatly outnumbered, were intimidated and afraid to proceed with their work.

After July 26 Bryan undertook to persuade his employees to resume their work. On the next day some of the workers returned to the job site, but were again confronted by representatives of the opposing labor organization who repeated their abusive threats, and consequently the plaintiff's employees were afraid to go back to work. There is further evidence that Bryan continued his efforts to retrieve the situation. He sought police protection, which was denied him; he attempted to hire new men, but they were afraid to work with him after what had happened.

[fol. 2235] On behalf of the defendants there is evidence that some of the Laburnum employees refused to return to work because Hart had posted picket signs on the job site and these employees refused to pass these signs or cross the so-called "picket lines." But there is ample evidence to support the finding that the plaintiff's employees refused to resume their work because of the threats and conduct of Hart and his associates.

Bryan talked with Hart again at the job site on August 1, and, as he says, Hart "left no doubt in anybody's mind that he was going to have people to stop any men from working who tried." "He continually threatened to bring a large crowd of people there from Beaver Creek and other places to stop us from working if any of our people went to work. He said he would do that unless we signed a paper recognizing his organization as the representative of the labor-

ers." Bryan replied that he wouldn't do it and couldn't do it" because of his prior obligation to another labor organization. Moreover, Hart threatened that if the Laburnum men "went back to work he was going to close down the mine operations by stopping the United Mine Workers from working for Pond Creek."

On August 3, 1949, Bryan reported the whole situation to the officials of Pond Creek Pocahontas Company and Island Creek Coal Company. In the meantime these coal producers [fol. 2236] had become alarmed lest the disturbance spread to their own employees who were members of the United Mine Workers and bring on a stoppage of their mining operations. Consequently, on August 4, the coal companies, because of the dispute in which the plaintiff had become involved with representatives of these labor organizations, canceled the construction contracts with Laburnum which were then in progress.

Hoping, nevertheless, to save the situation, on August 5 Bryan talked with David Hunter at the latter's office in Pikeville, Kentucky. But Hunter refused Bryan's plea for help and told him that Hart was working under his (Hunter's) direction and could have brought 6,000 men to the job site, if that had been necessary to stop the Laburnum employees from working.

On May 15, 1950, Bryan called on Hunter at the latter's office at Pikeville and told him that Laburnum was contemplating submitting a bid on other work in Mingo county, West Virginia, and inquired as to Hunter's attitude should Laburnum employ members of the American Federation of Labor on that project. Hunter replied that Laburnum would be expected to use members of the United Construction Workers on the project. Bryan testified that during [fol. 2237] this conversation Hunter admitted that Hart's conduct at the site of the work in which the Laburnum company had been engaged during the preceding July was "pursuant to his (Hunter's) orders."

After the violent events of July, 1949, Pond Creek Pocahontas Company and Island Creek Coal Company abandoned the award of the additional work upon a cost plus five per cent basis which they had promised the Laburnum company. The coal companies invited bids upon this proposed construction, but Laburnum was unsuccessful in all of its bids

for such work. The officials of the coal companies expressed their high regard and sympathy for Bryan, but explained that they could not run the risk of having the defendants unions shut down the mining operations because of the union's differences with Laburnum.

Hence, there is ample evidence to sustain the finding that the acts and conduct of Hart in July, 1949, and ratified by Hunter, disrupted the business relationship between Laburnum, Pond Creek Pocahontas Company and Island Creek Coal Company, and entitled Laburnum to an award of damages against Hart's principals.

United Mine Workers of America is a labor organization with approximately 650,000 members who are primarily engaged in mining and processing coal at the mines.

[fol. 2238] District 50 United Mine Workers of America has a membership of 112,000, which is largely made up of workers who convert coal into chemical constituents, such as dyes, drugs, plastics, etc. A part of its charter fees, initiation fees and dues is paid to the United Mine Workers of America. According to defendant's brief, "its members are part of UMWA, but retain their identity, membership rights and privileges at all times as members of District 50." In other words, District 50 is an arm or branch of the United Mine Workers of America.

United Construction Workers, affiliated with United Mine Workers of America, is a "division" of District 50 United Mine Workers of America, and has approximately 46,000 members who are, according to its "Rules," "employed in and around construction and allied industries, also fabricating plants, motor transportation, and maintenance and service industries." As defendants' brief says, its members "are a part of UMWA, but retain their identity, membership rights and privileges at all times as members of the UCW Division of District 50."

Thus, while the defendants' brief insists that "members of District 50, UCW and UMWA are not members of one organization," a fair deduction from the record is that District 50 is a component part of United Mine Workers of [fol. 2239] America, or at least its agent in organizing workers in businesses other than that of mining coal. Admittedly, Hart was employed by District 50 United Mine Workers of America and assigned to work as "field repre-

sentative" under Hunter, a "regional director." It is also admitted that in "that capacity" Hart served both District 50 United Mine Workers of America and United Construction Workers. As we interpret the brief of the defendants, there is no serious contention that any one of the defendant organizations should be freed of liability, if any liability were found to exist, for the acts of Hart and his associates upon which the plaintiff's cause of action is predicated.

Damages

With the consent of counsel the court instructed the jury that they should specify separately the amount of compensatory and punitive damages, if any, allowed. By their verdict the jury awarded the plaintiff compensatory damages of \$175,437.19 and punitive damages of \$100,000, or a total of \$275,437.19.

The alleged wrongful acts upon which the verdict is predicated having been committed in Kentucky, the correctness of the award must, of course, be tested by the law of that State.

[fol. 2240] In Kentucky, as in Virginia, damages directly and proximately caused by wrongful conduct chargeable to the defendants are collectible, provided they are not uncertain, speculative, or remote. Loss of future profits by the interruption or destruction of an established business, if capable of reasonable ascertainment may be recovered. *American Bridge Co. v. Glenmore Distilleries Co.*, 32 Ky. L. Rep. 873, 107 S.W. 279; *Kentucky Heating Co. v. Hood*, 133 Ky. 383, 118 S. W. 337, 22 L.R.A., N.S. 588; *E. I. duPont deNemours & Co. v. Universal Moulded Products Corp.*, 191 Va. 525, 568-573, 62 S.E. 2d 233, 253-255.

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Compensatory Damages

As the result of the acts of the defendants and their agents, Laburnum claimed these items of compensatory damages;

1. Damage from loss of fee on contract for construction of 25 dwellings	\$ 534.19
2. Damage from loss of fee on work in connection with construction of schoolhouse	319.67
3. Damage from loss of fee in connection with work for installation of asbestos shingles on said 25 dwellings	250.00
4. Damage from loss of fee in connection with work for installation of concrete foundation for coal preparation plant for No. 2 mine	1,250.00
5. Damage from loss of fee on other additional work in Breathitt county, Kentucky, amounting to approximately \$542,500, which Pond Creek Pocahontas Company had agreed to have Laburnum Construction Corporation handle on a basis of cost plus a fee of five (5) per cent	27,125.00
[fol. 2241] 6. Damage by reason of the destruction of the business relationship and connection which Laburnum Construction Corporation had built up and developed with Pond Creek Pocahontas Company, Island Creek Coal Company and their associated and subsidiary companies	120,000.00
7. Damage to plaintiff's reputation	100,000.00

Since, as the evidence shows, construction of the coal preparation plant, under the contract of October 28, 1948, was ninety-five per cent complete when the work thereon was interrupted, and Laburnum had been paid the stipulated maximum fee of \$12,000, no damage was claimed with respect to this project.

The first five items of the alleged damages are for profits which the plaintiff claims it would have earned on additional work which was promised to it by the coal companies on a cost plus five per cent fee basis, and which it would have ear-

ried out had the business relationship not been interrupted by the wrongful conduct of the defendants' agents.

Items Nos. 1 and 2 are for the loss of profits on contracts for additional work which was awarded to, and had been partially completed by, Laburnum when the work was interrupted.

Items Nos. 3 and 4 are for the loss of profits for additional work which had been awarded to Laburnum, but work on which was prevented and never commenced because of the alleged acts of the defendants.

[fol. 2242] Item No. 5 is for the loss of profits on the remaining additional work which Laburnum says had been promised but not actually awarded to it by the coal companies, and which work the plaintiff says would have been awarded to and completed by it but for the interruption of the business relationship through the acts of the defendants.

The construction of twenty-five dwellings referred to in Item No. 1, was about eighty-five per cent complete when work thereon was stopped. Up to that time Laburnum had been paid \$1,965.81 of the agreed maximum fee of \$2,500, leaving a balance of \$534.19, which the plaintiff's evidence shows it would have earned by way of profit if it had been permitted to complete the project.

The construction of the schoolhouse, referred to in Item No. 2, was from eighty to eighty-five per cent complete when work thereon was stopped. The project was completed by another contractor at a cost of \$3,338, and the plaintiff's evidence shows that if it had been allowed to complete the work it would have earned the agreed fee of five per cent of this amount, or \$166.90, instead of \$319.67 claimed in its statement of damages.

[fol. 2243] The project referred to in Item No. 3, for the installation of asbestos shingles on twenty-five dwellings was awarded to Laburnum on a cost plus five per cent fee basis and work thereon was to commence in August, 1949. The estimated cost of the project was \$5,000. The plaintiff's evidence shows that but for the interruption of the business relationship it would have performed this work and earned the agreed fee of \$250.

The project for the installation of the concrete foundation for the coal preparation plant, referred to in Item No. 4, was awarded to Laburnum in July, 1949, at an esti-

mated cost of \$25,000, upon a cost plus five per cent fee basis. But Laburnum was unable to proceed with that project because, as Salvati testified, its employees, by reason of the acts of the defendants' agents, were "run off the job there." The evidence on behalf of the plaintiff is that it would have earned the agreed fee of \$1,250 but for the interruption of the work.

Although there is argument to the contrary in defendants' brief, each of the Items Nos. 1, 2, 3 and 4 was within the purvie- of Instruction No. 9, which submitted to the jury the plaintiff's claim for damages.

[fol. 2244] Item No. 5 embraces the plaintiff's claim for profits on the remaining additional work which had been promised it by the coal companies, although no part of this work had actually been awarded. The evidence on behalf of the plaintiff tends to show that but for the interruption of the business relationship this work would have been awarded to and performed by it at an estimated cost of \$542,500, on a cost plus five per cent fee basis, and that had it been allowed to proceed with the work it would have earned the percentage fee of \$27,125.00.

The defendants contend that the evidence with respect to Item No. 5 fails to support the claim that this work was actually promised Laburnum by the coal companies, or if promised, that the alleged acts of the defendants' agents prevented the commencement of the work. Moreover, the defendants say, the alleged loss of profits from this supposed "promised work" is so speculative and uncertain as to be incapable of reasonable ascertainment.

There is evidence on behalf of the plaintiff that in September, 1948 it had been advised that these coal companies were about to embark on a definite building program of considerable proportions. Bryan testified that at the time of the execution of the contract for the construction of the [fol. 2245] coal preparation plant on October 28, 1948, because of the unusual difficulties in connection with that undertaking, Salvati, who was then vice-president in charge of operations of Pond Creek Pocahontas Company, verbally promised him that Laburnum would be given additional work in Breathitt county, amounting to approximately \$600,000, and that this was to be done on a cost plus five per cent fee basis. Salvati identified the list of work, con-

taining twelve items totaling \$617,500, which had been approved by the board of directors of his company and referred to by Bryan. He likewise corroborated Bryan's testimony that it was agreed Laburnum would be awarded this additional work.

Pursuant to this arrangement Laburnum actually performed a part of the work referred to in the testimony of Bryan and Salvati. It constructed a telephone line at a cost of approximately \$4,600, on the basis of cost plus fee of five per cent. As part of this additional work it undertook and partly completed the projects referred to in Items Nos. 1 and 2 of the plaintiff's list of damages. It was awarded the projects referred to in Items Nos. 3 and 4 of the plaintiff's damages both on a cost plus five per cent fee basis, although, as has been said, work on these latter two projects was never actually commenced because of the trouble which arose.

[fol. 2246] Salvati testified that the balance of the work referred to in the program and amounting to \$542,500, would have been awarded to Laburnum on a cost plus five per cent fee basis if its organization and equipment had still been at the job site "and if the United Mine Workers of America and its branches had not threatened to interfere with the work."

It is true, as is argued by the defendants, that there is evidence which tends to refute the plaintiff's claim that it had been promised or would have been awarded this additional work. They point to the fact that since August 4, 1949 the coal companies have actually awarded contracts for a relatively small portion of this work. There is also evidence that subsequently Laburnum submitted a conditional bid for a portion of this work, which was rejected. But this conflict in the evidence merely presented a question of fact which the Jury's verdict has resolved in favor of the plaintiff. We think there is sufficient evidence to support the finding that but for the disruption of the business relationship by the acts of the defendants' agents the plaintiff would have been awarded and allowed to proceed with this additional work.

[fol. 2247] We are of further opinion that the plaintiff's loss of profits from this promised work has been established with reasonable certainty. This was not a new and unpre-

dictable venture. On the contrary, the work had been approved by the board of directors of Pond Creek Pocahontas Company, the cost plus fee basis had been agreed upon, and the amount of the estimated profits on the proposed construction was, therefore, reasonably ascertainable.

In Item No. 6 the plaintiff claimed \$120,000 damages for the alleged permanent destruction of its business relationship with Pond Creek Pocahontas Company, Island Creek Coal Company, and their subsidiaries. In support of this item the plaintiff showed that it had been doing business with these companies for a period of approximately two years preceding the disruption of the relationship, at an annual profit of about \$25,000; that because of the disturbance in July, 1949, in which the plaintiff incurred the hostility of the defendant unions, the coal companies which employed in their mining operations members of one of the unions, permanently broke off their business relationship with the plaintiff; and that as a result of this the plaintiff lost profits which it would have earned had the relationship not been disturbed.

[fol. 2248] We may assume without deciding that the evidence supports a finding that the conduct of the defendants' agents was the proximate cause of the permanent disruption of the profitable relationship between the plaintiff and these coal companies. The crucial inquiry is, does the evidence support a finding that the plaintiff is entitled to substantial damages by way of loss of profits as the result of such wrongful acts?

"Where a regular and established business is injured, interrupted, or destroyed, the measure of damages is the diminution in value of the business by reason of the wrongful act," measured by the loss of the usual profits from the business. 25 C. J. S., Damages, Sec. 90-b, p. 633.

In *E. I. duPont de Nemours & Co. v. Universal Moulded Products Corp.*, *supra* (191 Va., at pages 569-573, 62 S. E. 2d, at pages 253-255), there is a full discussion of the principles upon which damages for loss of profits from the interruption of an established business are to be measured. We there stated the generally accepted rule that for such damages to be recoverable they "Must be established with reasonable certainty. If remote, speculative, contingent or

uncertain, they are not recoverable." (191 Va., at page 573, 62 S. E. 2d, at page 255.)

[fol. 2249] The Kentucky court follows this general rule. *American Bridge Co. v. Glenmore Distilleries Co.*, supra (107 S. W., at page 284); *Kentucky Heating Co. v. Hood*, supra (118 S. W., at page 338).

In our opinion the evidence adduced on behalf of the plaintiff with respect to Item No. 6 does not measure up to these requirements. We are not here concerned with the disruption of a business relationship involving numerous transactions with numerous customers, where the volume of future business may be estimated with reasonable certainty. On the contrary, the plaintiff had established a relationship with what was in effect a single customer, involving a relatively small number of transactions. Unlike the preceding five items of the plaintiff's damages, there is no evidence that these coal companies had promised the plaintiff any further work, or that they had definitely decided upon an additional construction program. Whether such construction work would have been undertaken by these companies, and if so, the extent thereof and what part thereof, if any, would have been awarded to the plaintiff and upon what terms, is entirely speculative and conjectural. Evidence that the plaintiff during the past preceding two years had done work for these companies at an annual profit of \$25,000, standing alone, will not, we think, support a finding, as the plaintiff argues, that this situation would have continued over a period of years. In short, [fol. 2250] the plaintiff's evidence fails to establish the amount and extent of its damage under this item with the required reasonable certainty.

In Item No. 7 the plaintiff claimed \$100,000 as damages to its business reputation. The record is devoid of any evidence that the plaintiff's business reputation was in any way damaged by reason of the alleged wrongful acts of the defendants. The argument on behalf of the plaintiff is that "the mere fact, that the defendant unions wrongfully ran Laburnum out of Kentucky," thereby causing these coal-producing companies to cancel their contracts with the plaintiff, "necessarily damaged" the plaintiff's business reputation in the coal fields of West Virginia and Kentucky and throughout the United States. If such were the result of the defendant's wrongful conduct it was easily susceptible

of proof, and yet admittedly there is no evidence in the record to this effect.

The plaintiff relies upon the statement in 15 Am. Jur., Damages, Sec. 135, p. 544, that "In tort actions, injuries to the plaintiff's reputation, injuries to, or the loss of, commercial credit, and injuries to financial or business standing constitute proper elements of damages where they are the natural and proximate results of the defendant's wrongful acts. Thus, where an injury has been done to an [fol. 2251] established business, the damages therefor may include damages resulting from injury to credit and business standing." But this does not mean that proof of such damages is not necessary. Indeed, the text just quoted cites as authority, *Virtue v. Creamery Package Mfg. Co.*, 123 Minn. 17, 142 N. W. 930, L. R. A. 1915B, 1179, in which it was said: "Damages for injury to the plaintiff's business, its reputation, standing, and good will, may, upon proper proof, be recovered." (142 N. W., at page 940; emphasis added.) Nor does the holding in *Peshine v. Shepperson*, 17 Gratt. (58 Va.) 472, 94 Am. Dec. 468, dispense with the necessity of proof of such damages.

In 25 C. J. S., Damages, Sec. 144, p. 788, it is said: "As noted in Sec. 6 *supra*, a presumption of at least nominal damages follows from proof of a legal wrong. However, the amount and items of pecuniary damage are not presumed, but must be proved; and if there is no evidence as to the extent of the pecuniary loss there can be no recovery of substantial damages, at least where the elements of damage are such as to be susceptible of pecuniary admeasurement. The burden of proving the fact and amount of pecuniary damage is on the party asserting the damage, particularly in the case of damages which are uncertain [fol. 2252] or have not been admitted; * * *." See also, 15 Am. Jur., Damages, Sec. 356, p. 795.

In the absence of proof of damage to the plaintiff's business reputation there is no basis for the allowance of an award under this item.

We are of opinion, then, that there is ample evidence to sustain an award of \$29,326.09, based on the first five items of plaintiff's claim for compensatory damages, with the allowance of \$166.90 under Item No. 2, instead of \$319.67 as claimed. The evidence does not, in our opinion, sustain

an award on account of Items Nos. 6 and 7 of the plaintiff's claim.

Punitive Damages

Under the decisions of the Kentucky court, to justify an award of punitive damages for a tort there must be a showing of malice or willfulness, or a wanton disregard of the rights of others from which it may be assumed that the tort-feasor was acting either maliciously or willfully. *W. T. Sistrunk & Co. v. Meisenheimer*, 205 Ky. 254, 265 S. W. 467, 468. As expressed in *Great Atlantic & Pacific Tea Co. v. Smith*, 281 Ky. 583, 136 S. W. 2d. 759, 768, punitive damages "are allowed where the tort is aggravated by evil motive, actual malice, or deliberate violence."

[fol. 2253] In *Engleman v. Caldwell & Jones*, 243 Ky. 23, 47 S.W. 2d 971, an award of punitive damages for the conduct of the defendant in persistently driving away trade from plaintiffs' store by derogatory and offensive remarks was upheld. The court there said: "The appellant's conduct and declarations were an invasion of appellees' rights (citing authorities), and not only aggravating and insulting but were engaged in by him in utter reckless disregard of the rights of the appellees to enjoy the peaceful pursuit of their own business." (47 S. W. 2d, at page 973.)

In *Anchor Co. v. Adams*, 139 Va. 388, 392, 124 S.E. 438, we held that the willful and unauthorized destruction of one's business is the ground for the imposition of punitive damages on the wrongdoer.

Tested by these principles we are of opinion that there was ample evidence to support the finding that the acts of the defendant's agents were done willfully and maliciously, and thus entitled the plaintiff to an award of punitive damages. According to the evidence of the plaintiff's witnesses, this was no peaceful labor dispute in which the agents of the defendants were merely attempting to organize or persuade a few unskilled laborers to join the union. On the contrary, there is ample evidence that it was the willful and avowed [fol. 2254] purpose of defendants' agents to prevent the plaintiff's employees from proceeding with their work unless these employees joined the United Construction Workers, one of the defendant unions, and that such purpose was evinced by words and conduct so violent and abusive as to

put these employes in fear for their lives and safety. Yielding to these threats the plaintiff's employees refrained from continuing with their work, with the result that plaintiff's business relationship with its customers was disrupted and destroyed, to its considerable damage.

At the request of plaintiff the jury were instructed that they might allow punitive damages if they believed from the evidence that the alleged wrongful acts of the defendants' agents were "committed in a manner so wanton or reckless as to manifest a willful disregard for the rights of others." At the request of the defendants the jury were told that if "Hart and the men associated with him on the occasions complained of acted solely for the purpose of enforcing their legal rights in a lawful manner, and not for the purpose of injuring the plaintiff, no exemplary or punitive damages" could be awarded. The jury's finding on the issue is, of course, binding on us.

[fol. 2255] We are not impressed with the argument that the award of \$100,000, by way of punitive damages, was excessive. In Kentucky punitive damages "are given as compensation to the plaintiff and not solely as a punishment of the defendant." They must bear some relation to the "injury and cause thereof" rather than to the amount of compensatory damages allowed.² *Louisville & N. R. Co. v. Ritchel*, 148 Ky. 701, 147 S.W. 411, 414, 41 L.R.A., N.S. 958, Anno. Cas. 1913E, 517.

The general rule is that there is no fixed standard for the measurement of exemplary or punitive damages, and the amount of the award is largely a matter within the discretion of the jury. 25 C.J.S., Damages, Sec. 126, p. 737. In *Engleman v. Caldwell & Jones*, *supra*, the Kentucky court held that the jury may award punitive damages according to their conclusions from the entire evidence respecting the conduct and motives of the person inflicting the wanton injury. The award "may not be considered excessive" merely because in the estimation of the adverse party the amount is large. (47 S.W. 2d at page 973.)

Under these principles the amount of punitive damages was, we think, within the discretion of the jury.

² Compare *Stubbs v. Cowden*, 179 Va. 190, 18 S.E. 2d 275.

[fol. 2256]

Procedural Matters

By more than one hundred assignments of error the defendants challenge various rulings of the lower court during the progress of the trial. Some of these assignments are trivial and others are so vague and indefinite as not to merit discussion. Within the limits of an opinion of reasonable length, we may deal only with those assignments which relate to the rulings of the trial court on crucial matters.

A number of the assignments challenge the rulings of the trial court on the admissibility of hearsay testimony. First, it is said, the court erred in permitting Bryan and others to testify as to declarations made by Laburnum employees that they would not return to work because the declarants were in fear of violence at the hands of defendants' agents.

It is well settled that evidence of such utterances is admissible to show the state of mind of the declarants. Wigmore on Evidence, 3d Ed., Vol. 6, Sections 1789, 1790, pp. 235-239; *Karnes v. Commonwealth*, 125 Va. 758, 764-765, 99 S.E. 562, 4 A.L.R. 1509; *Parsons v. Commonwealth*, 138 Va. 764, 777-782, 121 S.E. 68; *Goodloe v. Smith*, 158 Va. 571, 582-584, 164 S.E. 379. Such evidence was relevant to [fol. 2257] show that fear of the consequences was the compelling reason why plaintiff's employees quit their work.

Secondly, the defendants complain of the admission of evidence of the declaration of certain representatives of the American Federation of Labor, which tended to show that the representatives of the rival union were cognizant of the situation which had been brought about by the acts of the defendants' agents and that it was dangerous for the Laburnum employees who were members of the declarants' union to return to work.

While the evidence of the mental attitude of these representatives was somewhat remote, it tended to corroborate the plaintiff's other evidence of the tense situation which pervaded the neighborhood and had caused the Laburnum employees to refuse to return to work. As is indicated in *Karnes v. Commonwealth*, *supra*, the modern trend is toward liberalization of the rules of evidence in order that the jury may be fully enlightened as to all the surrounding facts and circumstances.

Moreover, each of the declarants took the stand and testi-

fied as to the incidents. Consequently, admitting evidence of their declarations with respect to these incidents, if error, was harmless.

[fol. 2258] The admissibility of the evidence of the reputation of Breathitt county, Kentucky, the site of the plaintiff's work and of the disturbance, for unrestrained lawlessness is governed by the same principle. It was corroborative of evidence on behalf of the plaintiff that there was real cause for its employees being afraid to return to their work.

Error is assigned to the action of the trial court in permitting Frank Dixon, a representative of the Carpenters and Joiners Union, an affiliate of the American Federation of Labor, to testify that he received "in a round-about way" a message from Thomas E. Raney, a representative of the United Mine Workers of America, after the present case was set for trial, that Raney wanted to meet him and work out a settlement to keep the members of the American Federation of Labor affiliate from testifying. Upon being asked by the court what he meant by "round-about way," Dixon replied that he was refraining from disclosing the name of his informant because he (Dixon) feared that his doing so might bring bodily harm to that person.

In the absence of the jury counsel for the defendants were given the privilege of asking Dixon to name his informant and they declined to do so. In this situation they are hardly [fol. 2259] in a position to complain that the name of the informant should have been developed by counsel for the plaintiff rather than by themselves.

Moreover, later Raney took the stand and flatly denied that he had sent such message to Dixon, or that he had ever heard "of such person." We find no prejudicial error in the ruling of the trial court with respect to this incident.

In preparation of its case the plaintiff propounded to the defendants a number of interrogatories, the main purpose of which was to show the relation between the three union defendants. At the trial the plaintiff offered in evidence all of the interrogatories and answers with the exhibits thereto attached, and was allowed to read to the jury such questions, answers and exhibits as counsel deemed pertinent and the court ruled to be admissible. The defendants were then given the privilege of reading to the jury any remain-

ing questions and answers which their counsel deemed pertinent.

The defendants objected to this procedure, claiming that under a proper interpretation of the statute (Code, Sec. [fol. 2260] 8-322)³ all of the questions, answers and exhibits should have been read *in extenso* to the jury by counsel for the plaintiff when they were offered in evidence. In support of this contention they cite *M'Farland v. Hunter*, 8 Leigh (35 Va.) 489, 497, which holds that under the statute the whole of the answers to interrogatories, like the answer to a bill of discovery, must be read. Properly interpreted, this holding means nothing more than that the opponent whose answer is introduced in evidence has the right "to have the whole, or none, laid before the court." Wigmore on Evidence, 3rd Ed., Vol. 7, Sec. 2121, p. 542. That was done when the whole of the interrogatories and answers were put in evidence. When the court permitted counsel for the plaintiff to read to the jury such portion of the lengthy interrogatories and answers as they deemed pertinent, and offered counsel for the defendants the same opportunity, obviously the rights of the defendants were fully protected.

On February 13, 1951, the Richmond News Leader, a newspaper published in the city of Richmond, where the trial was then in progress, published an editorial entitled "Enemies of the Miner." The purport of this editorial was that John L. Lewis, the head of the United Mine Workers of America, one of the defendant unions, in notifying the members of the union of an increase in their daily wages, had [fol. 2261] told them that each would be assessed the sum of \$20 a year to create a fund to defend "expensive litigation" which the "enemies of the union" had instituted or were contemplating instituting against it. The editorial deplored the fact that although "Mr. Lewis' language has the ring of a Politburo voice denouncing the 'enemies of democracy,'" no one had been "heard to protest" against it.

³ "Sec. 8-322. *Use of such answers.* Answers to such interrogatories may be used as evidence at the trial of the cause, in the same manner and with the same effect as if obtained upon a bill of discovery."

On the day following publication of the editorial, and while the court was considering the instructions, counsel for the defendants moved for a mistrial because of the editorial, claiming that it was inflammatory and highly prejudicial to the interests of the defendants. The attention of the court was directed to the fact that the publisher of the newspaper was a relative of A. Hamilton Bryan, the president of Laburnum. While Bryan admitted his relationship with the publisher of the paper, and the fact that he owned "a small minority stock interest" in the corporation which published the paper, he testified that he was in no way responsible for the editorial and had nothing whatsoever to do with its publication. This testimony is uncontradicted.

Inasmuch as the court had instructed the jury not to read "any newspaper articles about this case during the trial," it [fol. 2262] overruled the motion for a mistrial. However, it then and there offered to poll the jury to ascertain whether or not any of them had read the editorial and whether they might be influenced thereby. This offer was declined by counsel for the defendants. Immediately after the verdict was announced the defendants requested the court's permission to poll the jury to determine whether any of them had read the editorial. The motion was overruled.

Error is now assigned to the action of the trial court in declining to grant a mistrial before the verdict and in overruling the defendants' request after the verdict that they be allowed to poll the jury.

Assuming that those responsible for the publication of the editorial knew that the present case was being tried and the issues it involved, the publication was reprehensible, for it might have prejudiced the rights of the United Mine Workers of America, one of the defendants, and necessitated a new trial at great expense to the parties. But in the absence of a showing that any of the members of the jury read the article, or were influenced thereby, and in view of the fact that counsel for the defendants were afforded and declined the opportunity extended them by the court before the verdict to ascertain whether this was so, there was no error in overruling the motion for a mistrial.

[fol. 2263] Having declined and waived the privilege of having the jury polled before the verdict, the defendants

cannot now be heard to complain of the court's action in not permitting a poll after the verdict.

We cannot undertake to review in detail the numerous assignments of error leveled at the rulings of the trial court on granting and refusing the instructions. Suffice it to say, that after a careful consideration of these rulings we find no prejudicial error in any of them, save the submission to the jury of the issue of the plaintiff's right to an award based on Items Nos. 6 and 7 of its claim for damages. There was, as we have said, insufficient evidence to go to the jury on either of these issues.

It is, of course, unnecessary that we discuss the assignments of error with respect to the admissibility of evidence relating to Items Nos. 6 and 7 of the plaintiffs claim for damages.

We find no reversible error in any of the remaining assignments of error.

On the whole our conclusion is that the award of compensatory damages of \$29,326.09, and punitive damages of \$100,000, or a total of \$129,326.09, is fully supported [fol. 2264] by the law and the evidence. The additional award of \$146,111.10⁴ for compensatory damages is not supported by the evidence.

Section 90 of the Constitution, as amended in 1928, provides in part that this court "may, but need not, remand a case for a new trial. In any civil case, it may enter final judgment, except that judgment for unliquidated damages shall not be increased or diminished."

The plain purpose of the provision is to leave to the fact-finding tribunal—the jury or the trial court sitting as a jury—the function of fixing the amount of unliquidated damages. It does not deprive this court of the authority to remand the case to the lower court with direction that the plaintiff be put upon terms to remit a portion of an award for unliquidated damages or else submit to a new trial. *Bishop v. Webster*, 154 Va. 771, 787, 153 S. E.

⁴ Allowable compensatory damages	\$ 29,326.09
Allowable punitive damages	100,000.00
Excess not allowable	146,111.10
<hr/>	
Total award under the verdict	\$275,437.19

832, 155 S. E. 828. Nor does it, in our opinion, divest this court of the well-recognized power to modify a judgment of the lower court in an action for unliquidated damages [fol. 2265] by eliminating such excess as is clearly attributable to the consideration of improper items, provided this court can determine and segregate the excess from the allowable portion of the award. 3 Am. Jur., Appeal and Error, Sec. 1174, pp. 683-684; *id.*, Sec. 1177, pp. 686-687; *Clinchfield Coal Corp. v. Couch*, 127 Va. 634, 639, 104 S. E. 802, 13 A. L. R. 398 (decided prior to the adoption of the amendment). Here the excess in the amount of compensatory damages is clearly attributable to the improper consideration of Items Nos. 6 and 7 of the plaintiff's claim.

Accordingly, under the authority of Code, Sec. 8-493, we shall modify the judgment under review by striking therefrom the sum of \$146,111.10 and affirm the balance of the judgment for the sum of \$129,326.09, with interest thereon from February 16, 1951, the date of the verdict. Having substantially prevailed on this appeal the plaintiff will recover its costs here.

Modified and affirmed. _____

[fol. 2266]

VIRGINIA:

In the Supreme Court of Appeals held at the Court Library Building in the City of Richmond on Monday the 20th day of April, 1953.

Record No. 3989

UNITED CONSTRUCTION WORKERS, affiliated with the United Mine Workers of America; District 50, United Mine Workers of America, and United Mine Workers of America, Plaintiffs in error,

against

LABURNUM CONSTRUCTION CORPORATION, Defendant
in error

Upon a writ of error and supersedeas to a judgment rendered by the Circuit Court of the city of Richmond on the 5th day of July, 1951.

This day came again the parties, by counsel, and the court having maturely considered the transcript of the

record of the judgment aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is error in the judgment complained of. It is therefore adjudged and ordered that the judgment under review be modified by striking therefrom the sum of one hundred forty-six thousand, one hundred eleven dollars and ten cents; and that the balance of the judgment for the sum of one hundred twenty-nine thousand, three hundred and twenty-six dollars and nine cents, with interest thereon to be computed after the rate of six per centum per annum from February 16th, 1951, until paid, and for its costs by it expended about the prosecution of its notice of motion for judgment in the said circuit court, be and the same is affirmed.

And it is further adjudged and ordered that the defendant in error recover of the plaintiffs in error its costs by it expended about the prosecution of the writ of error and supersedeas aforesaid here.

Which is ordered to be certified to the said circuit court.

A Copy,

Teste:

_____, Clerk.

Writ tax . . . , \$____.
 Printing . . . , \$____.
 Attorney's fee . . . , \$____.
 Small fees . . . , \$____.
 Transcript . . . , \$____.
 Printing brief . . . , \$____.
 Total . . . , \$____.

Teste:

_____ C. C.

1975

[fol. 2267] IN THE SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

Record No. 3989

UNITED CONSTRUCTION WORKERS, Affiliated with the United
Mine Workers of America; District 50, United Mine
Workers of America, and United Mine Workers of
America, Plaintiffs in error,

v.

LABURNUM CONSTRUCTION CORPORATION, Defendant
in error

Motion and Petition to Stay Proceedings

To the Honorables, the Chief Justice and the Justices of
the Supreme Court of Appeals of Virginia:

Plaintiffs in Error, United Construction Workers, Affiliated with the United Mine Workers of America; District 50, United Mine Workers of America, and United Mine Workers of America, and each of them, by their attorneys, respectfully move that the mandate of this Court upon its judgment entered herein on April 20, 1953, against said plaintiffs in error and in favor of defendant in error, Laburnum Construction Corporation, and the execution and enforcement of said judgment, may be stayed until and including July 18, 1953, to enable the plaintiffs in error, and each of them, being the parties aggrieved, to apply to the Supreme Court of the United States for review of said judgment by writ of certiorari, and until the final de-[fol. 2268] termination of the case by the Supreme Court of the United States.

Respectfully submitted this 5th day of May, 1953.
(S.) Walter E. Rogers, M. E. Boiarsky, Attorneys
for Plaintiffs in Error.

Williams, Mullen, Pollard & Rogers, American Building,
Richmond, Virginia.

I hereby certify that I have today mailed a copy of the within motion and petition to each of the following attorneys for Laburnum Construction Company:

1. George E. Allen, Esq., Attorney at Law, Mutual Building, Richmond, Virginia.

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2. Archibald G. Robertson, Esq., Attorney at Law, 1002
Electric Bldg., Richmond 12, Va.

(S.) Walter E. Rogers.

Dated May 5, 1953.

[fol. 2269]

VIRGINIA :

In the Supreme Court of Appeals held at the Supreme
Court of Appeals Building in the City of Richmond on
Monday the 11th day of May, 1953.

UNITED CONSTRUCTION WORKERS, affiliated with the United
Mine Workers of America; District 50, United Mine
Workers of America, and United Mine Workers of
America, *Plaintiffs in Error,*

against

LABURNUM CONSTRUCTION CORPORATION,
Defendant in Error.

Order Staying Mandate and Execution of Judgment.

On consideration of the motion and petition of counsel for
plaintiffs in error for stay of mandate of this Court upon its
judgment entered in the above-captioned case on April 20,
1953, and the execution and enforcement thereof, in order
that plaintiffs in error may have reasonable time and oppor-
tunity to present to the Supreme Court of the United States
a petition for writ of certiorari to review the said judgment
of this Court.

It is now ordered that the mandate of this Court upon its
judgment entered herein on April 20, 1953, against said
plaintiffs in error and in favor of defendant in error, La-
burnum Construction Corporation, and the execution and
enforcement of said judgment, be and the same are hereby
stayed until and including July 18, 1953, on the expiration
of which time the same may be enforced, unless application
for a writ of certiorari is filed in the Supreme Court of the
United States on or before said date, in which event said
mandate and the execution and enforcement of said judg-
ment shall be stayed until the final determination of the case
by that court.

The above stay of mandate and execution and enforcement of said judgment, however, shall not become effective until plaintiffs in error, or some one for them, enter into bond with sufficient surety approved by the clerk of this Court in the penalty of one hundred fifty thousand and no/100 dollars (\$150,000.00) upon condition that if plaintiffs in error fail to make application to the Supreme Court of the United States for a writ of certiorari in said case within the time allotted therefor, or fail to obtain an order granting their application, or fail to make their plea good in said Supreme Court of the United States, they shall perform and satisfy [fols. 2270-2278] said judgment and answer for all damages and costs which the defendant in error may sustain by reason of the stay, or in lieu thereof, by appropriate instrument to be filed with and approved by the clerk of this Court, continue in full force and effect the supersedeas bond given in the Circuit Court of the City of Richmond staying the execution of its judgment in this case pending the application to this court for a writ of error and supersedeas and make the said bond subject to the added conditions hereinabove specified, and which instrument shall be joined in by the surety on said supersedeas bond.

(S.) Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

[fol. 2279] IN THE SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

Record No. 3989

UNITED CONSTRUCTION WORKERS, affiliated with the United
Mine Workers of America ; District 50, United Mine Work-
ers of America, and United Mine Workers of America,
Plaintiffs in Error,

v.

LABURNUM CONSTRUCTION CORPORATION,
Defendant in Error.

Designation of the Record on Behalf of Plaintiffs in Error.

To the Clerk of the Supreme Court of Appeals of Virginia:

You are hereby requested to make a transcript of the record to be filed in the Supreme Court of the United States in the above-entitled cause and the above-named Plaintiffs in Error designate the following parts of the record which said Plaintiffs in Error, and each of them, desire to have included in the transcript:

1. A certified copy of the printed record.
2. A certified copy of petition of plaintiffs in error for a writ of error and a supersedeas to the judgment of the Circuit Court of the City of Richmond.
3. A certified copy of the order, dated January 24, 1952, awarding to plaintiffs in error a writ of error and supersedeas.
- [fol. 2280] 4. A certified copy of the certificate of E. M. Edwards, Deputy Clerk, Circuit Court of the City of Richmond, received in the office of the Clerk of the Supreme Court of Appeals of Virginia on January 23, 1952.
5. Proceedings in the Supreme Court of Appeals of Virginia:
 - a. Order of February 2, 1953, showing submission of the above-entitled cause to the Supreme Court of Appeals of Virginia.
 - b. Opinion of the Supreme Court of Appeals of Virginia filed on April 20, 1953.

c. Judgment of Supreme Court of Appeals of Virginia entered on April 20, 1953.

d. Motion of Plaintiffs in Error to Stay Mandate.

e. Order granting stay of mandate.

f. Bond agreement filed by plaintiffs in error.

g. This designation.

h. Certificate of the Clerk of the Supreme Court of Appeals of Virginia.

(S.) Walter E. Rogers, (S.) M. E. Boiarsky, Attorneys for Plaintiffs in Error.

[fol. 2281] Certificate of Service

Copy of the attached Designation of the Record was mailed, postage prepaid, to each of the following attorneys for defendant in error (Laburnum Construction Corporation, a corporation) at the addresses indicated below:

1. Archibald G. Robertson, Esq., 1003 Electric Building, Richmond 12, Virginia.

2. George E. Allen, Esq., Mutual Building, Richmond 13, Virginia.

3. Francis V. Lowden, Jr., Esq., 1003 Electric Building, Richmond 12, Virginia.

4. T. Justin Moore, Jr., Esq., 1003 Electric Building, Richmond 12, Virginia.

5. Hunton, Williams, Anderson, Gay & Moore, 1003 Electric Building, Richmond 12, Virginia.

(S.) Walter E. Rogers, Attorney for Plaintiffs in Error.

June 25th, 1953.

[fol. 2282]

VIRGINIA:

In the Supreme Court of Appeals held at the Court-Library Building in the City of Richmond on Thursday the 25th day of June, 1953

I, H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia, do hereby certify that the foregoing is a true and accurate copy of the printed record, pages 1 to 1926 (Volumes I to IV), inclusive, petition of plaintiffs in error

for a writ of error and supersedeas, certificate of E. M. Edwards, Deputy Clerk, Circuit Court of the City of Richmond, order of February 2nd, 1953, of the Supreme Court of Appeals of Virginia, the opinion of this Court delivered by Justice John W. Eggleston on April 20th, 1953, mandate of the Supreme Court of Appeals of Virginia dated April 20, 1953, motion of plaintiffs in error to stay mandate, order granting stay of mandate, bond agreement filed by plaintiffs in error, designation of the record on behalf of the plaintiffs in error in the case styled United Construction Workers and others against Laburnum Construction Corporation.

Witness my hand and seal of said court this 25th day of June, 1953.

H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia.

I, Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia, hereby certify that H. G. Turner, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing thereof clerk of the said court, and that the said attestation is in due form.

Witness my hand this 26th day of June, 1953.

Edward W. Hudgins, Chief Justice of the Supreme Court of Appeals of Virginia.

I, H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia, hereby certify that Edward W. Hudgins, whose genuine signature is subscribed to the foregoing certificate, was at the time of signing thereof Chief Justice of said court duly commissioned and qualified.

Witness my hand and the seal of said court this 29th day of June, 1953.

H. G. Turner, Clerk of the Supreme Court of Appeals of Virginia. (SEAL)

(9114)

[fol. 1981] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1953

No. —

UNITED CONSTRUCTION WORKERS, AFFILIATED WITH THE
UNITED MINE WORKERS OF AMERICA; District 50, United
Mine Workers of America, and United Mine Workers of
America, Petitioners,
v.

LABURNUM CONSTRUCTION CORPORATION

STIPULATION—Filed July 6, 1953

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of the petition for writ of certiorari the printed record shall consist of the certified transcript of the record as set forth in Petitioners' Designation of the Record and as certified by the Clerk of the Supreme Court of Appeals of Virginia and heretofore filed in the Supreme Court of the United States, except for

a. Certified copy of the petition for writ of error and supersedeas to the judgment of the Circuit Court of the City of Richmond (listed as Item 2 in said Designation and appearing in said certified transcript at pages 1943 to 2213, both inclusive), and

b. Bond agreement (listed as Item 5(f) in said Designation and appearing in said certified transcript at pages 2271 to 2278, both inclusive),

which exceptions need not be printed.

2. Any of the parties may refer in the petition for writ of certiorari and brief in support thereof and in the brief in [fol. 1982] opposition thereto to said transcript of the record filed in the Supreme Court of the United States, including any part or parts thereof which have not been printed.

M. E. Boiarsky, Winard Owens Counsel for Petitioners. Archibald G. Robertson, Geo. E. Allen Counsel for Laburnum Construction Corporation.

July 3, 1953.

1982

[fols. 1983-1984] [File endorsement omitted.]

[fol. 1985] IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1953

No. 188

[Title omitted]

STIPULATION—Filed February 24, 1954

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

1. For the purpose of hearing and determining said cause on the merits and the matters arising upon the petition for writ of certiorari therein, heretofore granted by this Court, the printed record shall be the same as that used and agreed upon for the purpose of said petition, except there shall be added thereto

- a. Order granting certiorari;
- b. Stipulation of said counsel regarding the printed record for purpose of said petition heretofore filed;
- c. This stipulation.

2. Any of the parties may refer in their printed briefs to the transcript of the record filed in the Supreme Court of the United States, including any part or parts not included [fol. 1986] in the printed record.

Kelly K. Hopkins, Harrison Combs, Willard Owens,
M. E. Boiarsky Counsel for Petitioners. Archibald
G. Robertson, Geo. E. Allen Counsel for Laburnum
Construction Corporation.

[fols. 1987-1988] [File endorsement omitted.]

1983

[fol. 1989] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1953

No. 188

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 18, 1954

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted limited to the following question:

“In view of the type of conduct found by the Supreme Court of Appeals of Virginia to have been carried out by Petitioners, does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State court from hearing and determining the issues in a common law tort action based upon this conduct.”

The Government is invited to submit a memorandum setting forth the policy of the National Labor Relations Board in regard to: (1) the proviso in § 10(a), 61 Stat. 146, 29 U. S. C. (Supp. 111) § 160(a), and (2) other cases, apart from those in § 10(a), in which the Board declines to exercise its statutory jurisdiction. The memorandum should indicate by what standards the Board declines to act and whether the standards are applied by rule or regulation or on a case by case method.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3559)